

3 Am. Jur. 2d Agency X A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Agency

John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Jill Gustafson, J.D., and Lucas Martin, J.D.

X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 50, 51, 61(1) to 62(3), 63(1), 64(1), 65 to 70, 78(2), 79(3)

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Personal Liability

A.L.R. Index, Principal and Agent

West's A.L.R. Digest, [Principal and Agent](#) 48, 50, 51, 61(1) to 62(3), 63(1), 64(1), 65 to 70, 78(2), 79(3)

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3 Am. Jur. 2d Agency § 192

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Agency

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

1. In General

§ 192. General fiduciary duty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 69(1)

Forms

Forms relating to rights, duties, and liabilities agent to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Once an agency relationship has been established, a fiduciary relationship arises as a matter of law.¹ An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship,² and the agent has a duty to refrain from doing any harmful act to the principal.³ Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship.⁴

The general fiduciary principle supplements manifestations that a principal makes to an agent, making it unnecessary for the principal to graft explicit qualifications and prohibitions onto the principal's statements of authorization to the agent.⁵ The agent's duty to the principal obliges the agent to act in accord with a reasonable interpretation of the principal's manifestation even when the agent believes that doing so is not in the principal's best interests.⁶

CUMULATIVE SUPPLEMENT

Cases:

Under Michigan's principles of agency, an agent owes his principal a duty of good faith, loyalty, and fair dealing. [Mike Vaughn Custom Sports, Inc. v. Piku](#), 15 F. Supp. 3d 735 (E.D. Mich. 2014).

Son was in a confidential or fiduciary relationship with mother at time of creation of power of attorney in son on behalf of mother, and therefore an exoneration clause in power of attorney would not relieve son of liability for breach of duty if clause was inserted as a result of an abuse of the confidential or fiduciary relationship, where, at time of creation of power of attorney, son had already been acting for some years as mother's agent in collecting farm rents, and son hired his own attorney to create power of attorney. [Neb. Rev. Stat. § 30-4015\(2\)](#). [In re Estate of Adelung](#), 306 Neb. 646, 947 N.W.2d 269 (2020).

The holder of a power of attorney has a fiduciary relationship with the principal; such a "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. R.C. § 1337.01 et seq. [Miller v. Shreve](#), 2014-Ohio-4612, 21 N.E.3d 666 (Ohio Ct. App. 5th Dist. Guernsey County 2014).

[END OF SUPPLEMENT]

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Footnotes

1 [Emerson Electric Co. v. Marsh & McLennan Companies](#), 362 S.W.3d 7 (Mo. 2012).

As to the creation and existence of an agency relationship, see §§ 14 to 19.

2 [Restatement Third, Agency § 8.01](#).

The first duty of the agent is to be loyal to his trust. [Timberline Four Seasons Resort Management Co., Inc. v. Herlan](#), 223 W. Va. 730, 679 S.E.2d 329 (2009).

An agency relationship imposes a fiduciary obligation to act on behalf of and for the benefit of another as a matter of law. [City of Hope Nat. Medical Center v. Genentech, Inc.](#), 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.3d 142 (2008).

As to an agent's fiduciary duties after termination of authority, see § 194.

As to duties of performance to the principal, see §§ 213 to 225.

As to duties of loyalty to the principal, see §§ 198 to 212.

3 [In re Estate of Hedke](#), 278 Neb. 727, 775 N.W.2d 13 (2009).

4 [Restatement Third, Agency § 8.01](#), comment b.

5 [Restatement Third, Agency § 8.01](#), comment b.

6 [Restatement Third, Agency § 8.01](#), comment b.

As to the agent's interpretation of his or her authority, see § 65.

3 Am. Jur. 2d Agency § 193

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1. In General

§ 193. General fiduciary duty—Scope of duty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 69(1)

An agent's fiduciary duties to the principal vary depending on the parties' agreement and the scope of the parties' relationship.¹ All who assent to act on behalf of another person and subject to that person's control are common-law agents and are subject to the general fiduciary principle;² thus, the fiduciary principle is applicable to gratuitous agents as well as to agents who expect compensation for their services and to employees as well as to nonemployee professionals, intermediaries, and others who act as agents.³ A subagent owes fiduciary duties to the principal, as well as to the appointing agent.⁴

When a principal is an organizational entity, an agent has a fiduciary obligation to the entity and may also be subject to fiduciary duties to constituents of the entity, such as shareholders in a corporation.⁵

An agent's fiduciary relationship to the principal does not shelter either person from the applicability of general legal rules and does not privilege conduct by the agent that is otherwise tortious or criminal although done with actual authority, nor does their fiduciary relationship privilege a principal who demands such conduct.⁶

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Footnotes

- 1 Restatement Third, Agency § 8.01, comment c.
- 2 § 192.
- 3 Restatement Third, Agency § 8.01, comment c.
- 4 Restatement Third, Agency § 8.01, comment c.

As to subagency, see § 7.

5 Restatement Third, Agency § 8.01, comment c.

6 Restatement Third, Agency § 8.01, comment c.

As to ratification of the tortious acts of an agent, see § 178.

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1. In General

§ 194. After termination of authority

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 69(8)

Forms

Forms relating to obligation of agent to return items or use of name of principal, generally, see Am. Jur. Legal Forms 2d, Agency [[Westlaw® Search Query](#)]

Once a relationship of agency has terminated, the former agent has a duty to the former principal to cease acting or purporting to act as that principal's agent.¹ A former agent who remains in possession of property of the principal holds it on the principal's behalf and is subject to the duties of an agent in using and handling the principal's property.² Following termination, an agent continues to have a duty to account to the principal for all that the agent receives on the principal's account.³

However, a contract between an agent and a principal may create a duty on the part of the agent that survives the termination of the agency relationship itself, such as where the contract requires the agent to repay money advanced by the principal, regardless of whether the agency relationship continues.⁴

Ordinarily, the end of an agency relationship ends the agent's duty to provide information to a former principal.⁵ However, a former agent may be subject to a duty to continue to furnish material information to a now-former principal when it is foreseeable to the agent that the principal will continue to rely on the agent for information, and the agent does not inform the principal that

no further information will be provided.⁶ Moreover, if a person, once an agent, continues to purport to act as an agent in dealings with third parties and to bind the principal, the purported agent may be subject to a duty to continue to provide information to the principal.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.09, comment b.
As to the duration and termination of the agency relationship, see §§ 31 to 63.
- 2 Restatement Third, Agency § 8.09, comment b.
As to the duties of an agent in using and handling a principal's property, see §§ 223 to 225.
- 3 Restatement Third, Agency § 8.12, comment d.
- 4 Restatement Third, Agency § 8.07, comment b.
- 5 Restatement Third, Agency § 8.11, comment c.
As to the duty to provide information, see § 222.
- 6 Restatement Third, Agency § 8.11, comment c.
- 7 Restatement Third, Agency § 8.11, comment c.

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A. Duties of Agent; Liability of Agent to Principal

1. In General

§ 195. After termination of authority—Posttermination competition

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 69(8)

Forms

Forms relating to as to covenant not to compete and other business activities of agent, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Legal Forms 2d, Garages, Service Stations, and Parking Facilities [[Westlaw® Search Query](#)]

Following the termination of an agency relationship, the agent is free to compete with the principal, except to the extent that the agent has entered into an enforceable agreement not to compete with the principal,¹ and is subject to the duties concerning confidential information and property of the principal.²

A former agent may use skills and more general knowledge, although learned in the course of work done for the former principal, in such competition.³ However, a former agent's right to compete with the principal is not absolute and does not privilege conduct that would be tortious if committed by a third party.⁴

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Footnotes

¹ Restatement Third, Agency § 8.04, comment b.

As to a former employee's right to compete with his or her former employer after termination of employment, see Am. Jur. 2d, Monopolies and Restraints of Trade, and Unfair Trade Practices § 1067.

2 Restatement Third, Agency § 8.04, comment c.

As to the duty to keep information confidential, see [§ 206](#).

As to responsibility for agency funds or property, see §§ 223 to 225.

3 Restatement Third, Agency § 8.04, comment c.

4 Restatement Third, Agency § 8.04, comment c.

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1. In General

§ 196. When principal's consent negates breach of duty

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  48

Conduct by an agent that would otherwise constitute a breach of a duty of loyalty¹ does not constitute a breach of duty if the principal consents to the conduct provided that:

(1) in obtaining the principal's consent, the agent

(a) acts in good faith

(b) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise deals fairly with the principal; and

(2) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.²

Practice Tip:

An agent bears the burden of establishing that the requirements stated above have been fulfilled.³

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Footnotes

- 1 As to the duties of loyalty, see §§ 198 to 212.
- 2 *Restatement Third, Agency* § 8.06(1).
As to the principal's consent in the case of material benefit to the agent, see § 199.
As to the principal's consent in the case of competition, see § 202.
As to the principal's consent in the case of dual agency, see § 211.
- 3 *Restatement Third, Agency* § 8.06, comment b.
As to the burden of proof, generally, see § 324.

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1. In General

§ 197. Remedies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 78(2), 79(3)

A.L.R. Library

[Right of Principal to Recover Punitive Damages for Agent's or Broker's Breach of Duty](#), 46 A.L.R.6th 185

Forms

Forms relating to rights, duties, and liabilities agent to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

Under appropriate circumstances, an agent's breach or threatened breach of fiduciary duty is a basis on which the principal may receive specific nonmonetary relief through an injunction. An agent's breach of fiduciary obligation may also furnish a basis on which the principal may avoid or rescind a contract entered into with the agent or a third party.¹

An agent's breach subjects the agent to liability for loss that the breach causes the principal and may also subject the agent to liability for punitive damages when the circumstances satisfy generally applicable standards for their imposition.²

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Footnotes

- 1 Restatement Third, Agency § 8.01, comment d(1).
As to remedies available when a material benefit arises out of an agent's position, see § 200.
As to remedies available for breach of the duty not to act for an adverse party, see § 212.
- 2 Restatement Third, Agency § 8.01, comment d(1).

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A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 198. Material benefit arising out of position

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(1), 69(7)

Forms

Forms relating to property purchased with money belonging to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position.¹ Even an agent's attempted acquisition of a material benefit may breach the agent's duty to the principal.² On the other hand, an agent is not prevented from acting in good faith outside the agency even though it may adversely affect the principal's business.³

If the agent's work for the principal involves identifying, assessing, and pursuing business opportunities on the principal's behalf, the agent's duties of performance require the agent to exercise reasonable care and diligence in connection with the opportunity.⁴ Moreover, all agents, even those whose assigned work does not involve the assessment or pursuit of business opportunities, have a fiduciary duty to the principal not to take personal advantage of an opportunity when either the nature of the opportunity or the circumstances under which the agent learned of it require that the agent offer the opportunity to the principal.⁵

Although many material benefits are explicit, direct, and pecuniary in nature, an agent may breach the agent's duty to the principal by acquiring a material benefit more indirectly if the benefit is acquired through the agent's use of position or in connection with a transaction conducted on behalf of the principal.⁶ An agent may also acquire a material benefit although by its terms, the benefit, its value, or its amount is contingent.⁷

To establish that the agent is subject to liability, it is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal as the benefit realized by the agent can often be calculated more readily than any harm suffered by the principal. However, when the principal can establish that the agent's conduct resulted in harm to the principal, the principal may recover compensatory damages from the agent.⁸

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Footnotes

- 1 Restatement Third, Agency § 8.02.
 - 2 Restatement Third, Agency § 8.02, comment c.
 - 3 Science Accessories Corp. v. Summagraphics Corp., 425 A.2d 957, 16 A.L.R.4th 170 (Del. 1980).
 - 4 Restatement Third, Agency § 8.02, comment d.
 - 5 As to the agent's duty to perform with care and diligence, see §§ 214 to 216.
 - 6 Restatement Third, Agency § 8.02, comment d.
 - 7 Restatement Third, Agency § 8.02, comment c.
 - 8 Restatement Third, Agency § 8.02, comment b.
- As to remedies for breach of the duty to not acquire material benefit from a third party, see § 200.

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a. Duty Not to Act Adversely

§ 199. Material benefit arising out of position—Consent and knowledge of principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(1), 69(7)

Forms

Forms relating to property purchased with money belonging to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

A principal may consent to an agent's receipt of a material benefit in connection with a transaction conducted or other actions taken on behalf of the principal or otherwise through the agent's use of position.¹

In assessing whether an agent has obtained valid consent from the principal to the agent's acquisition of a material benefit, it is necessary for the agent to make a full and fair disclosure to the principal.² In an organizational setting, such disclosure, to be effective, must be made to a disinterested decisionmaker who has authority within the organization to determine whether the agent's conduct is consistent with the organization's interests.³

Practice Tip:

An agent bears the burden of establishing that the principal consented to the agent's acquisition of a material benefit, and the principal is entitled to assume that the agent will make the disclosures requisite to effective consent by the principal.⁴

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Footnotes

- 1 Restatement Third, Agency § 8.06, comment c.
- 2 Restatement Third, Agency § 8.06, comment c.
- 3 Restatement Third, Agency § 8.06, comment c.
- 4 Restatement Third, Agency § 8.06, comment c.
As to the burden of proof, generally, see [§ 324](#).

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2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 200. Material benefit arising out of position—Remedies

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(1), 69(7)

Forms

Forms relating to property purchased with money belonging to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

When an agent breaches the duty not to acquire a material benefit from a third party,¹ the principal may recover monetary relief from the agent and, in appropriate circumstances, from any third party who participated in the agent's breach.²

The principal may recover any material benefit received by the agent through the agent's breach, the value of the benefit, or proceeds of the benefit retained by the agent. In this case, the principal's recovery is not subject to a deduction for expenses incurred by the agent to induce the third party to confer the benefit on the agent.³

The principal may also recover damages for any harm caused by the agent's breach. If an agent's breach of duty involves a wrongful disposal of assets of the principal, the principal cannot recover both the value of the asset and what the agent received in exchange.⁴ However, if an agent breaches the agent's fiduciary duty by taking personal advantage of a business opportunity, the principal may recover property that the agent acquired through the breach only if the principal reimburses the agent. The

amount of reimbursement is either the amount paid by the agent for the property or the amount for which the principal could have obtained the property, whichever is less.⁵

If a principal recovers damages from a third party as a consequence of an agent's breach of fiduciary duty, the principal remains entitled to recover from the agent any benefit that the agent improperly received from the transaction.⁶

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Footnotes

1 § 198.

2 Restatement Third, Agency § 8.02, comment e.

3 Restatement Third, Agency § 8.02, comment e.

4 Restatement Third, Agency § 8.02, comment e.

5 Restatement Third, Agency § 8.02, comment e.

6 Restatement Third, Agency § 8.02, comment e.

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a. Duty Not to Act Adversely

§ 201. Competition with principal

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(1), 69(4), 69(7)

Forms

Forms relating to competition, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Legal Forms 2d, Garages, Service Stations, and Parking Facilities [[Westlaw® Search Query](#)]

Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors.¹ An agent cannot bind the principal in a matter in which the agent's own interest conflicts with the duty owed to the principal.² A general power or authority given to the agent to do an act on behalf of the principal does not extend to a case where it appears that the agent him- or herself is the person interested on the other side; if such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be entrusted with power to act for the principal and for him- or herself at the same time.³

Observation:

Competition is not limited to conduct subject to the law governing unfair competition or antitrust law. In determining whether an agent's conduct contravenes the rule stated above, the relevant objective to be served is facilitating compliance with and enforcement of the agent's fiduciary duty to the principal.⁴

CUMULATIVE SUPPLEMENT

Cases:

Under Oklahoma law, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal. [ATS Group, LLC v. Legacy Tank and Industrial Services LLC, 407 F. Supp. 3d 1186 \(W.D. Okla. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Restatement Third, Agency § 8.04.
As to an agent's duty not to compete with the principal after termination of the agency, see [§ 195](#).
- 2 [Synectic Ventures I, LLC v. EVI Corp., 353 Or. 62, 294 P.3d 478 \(2012\)](#).
- 3 [Synectic Ventures I, LLC v. EVI Corp., 353 Or. 62, 294 P.3d 478 \(2012\)](#).
- 4 Restatement Third, Agency § 8.04, comment b.

3 Am. Jur. 2d Agency § 202

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§ 202. Competition with principal—Consent by principal

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Forms

Forms relating to competition, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Legal Forms 2d, Garages, Service Stations, and Parking Facilities [[Westlaw® Search Query](#)]

A principal may consent to conduct by an agent that would otherwise breach the duty to refrain from competing with the principal.¹ A principal's consent to action may be explicit,² or it may be implied through understandings and known customs, including those normally associated with a type of agency relationship in which an agent may act on behalf of multiple customers or clients.³ Nevertheless, an agent who engages in a business which might conflict with the principal's interests has a duty to exercise good faith by disclosing to the principal all the facts regarding the matter.⁴

Practice Tip:

It is not a defense to an agent that the agent honestly believes that competitive activity will not injure the principal.⁵

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Footnotes

- 1 Restatement Third, Agency § 8.04, comment a.
- 2 Restatement Third, Agency § 8.04, comment b.
- 3 A principal can authorize an agent to engage in a transaction in which the agent has a conflict of interest with the principal; however, the authorization must be specific. *Synectic Ventures I, LLC v. EVI Corp.*, 353 Or. 62, 294 P.3d 478 (2012).
- 4 Restatement Third, Agency § 8.04, comment b.
- 5 General Automotive Mfg. Co. v. Singer, 19 Wis. 2d 528, 120 N.W.2d 659 (1963).
- Restatement Third, Agency § 8.04, comment b.

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§ 203. Competition with principal—Actions taken by agent prior to termination

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(8)

Forms

Forms relating to competition, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Legal Forms 2d, Garages, Service Stations, and Parking Facilities [[Westlaw® Search Query](#)]

Throughout the duration of an agency relationship, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship.¹

An agent who plans to compete is free to make extramural arrangements for setting up a new business, such as incorporating a new firm and arranging for space and equipment. On the other hand, an agent or employee is not free, while still employed, to commence doing business as a competitor or to solicit customers away from the principal.² In general, an employee or other agent who plans to compete with the principal does not have a duty to disclose this fact to the principal; nor does an agent's duty to provide facts to the principal³ require disclosure to the principal of an agent's competitive plans.⁴

Footnotes

- 1 Restatement Third, Agency § 8.04.
As to an agent's duty not to compete with the principal after termination of the agency, see § 195.
- 2 Restatement Third, Agency § 8.04, comment c.
- 3 § 222.
- 4 Restatement Third, Agency § 8.04, comment c.

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3 Am. Jur. 2d Agency § 204

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 204. Taking unfair advantage or secret profit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(2)

Forms

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to secret commissions or concealed profits, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Profits made and advantages gained by an agent in the execution of the agency, beyond the agent's agreed compensation, belong to the principal unless the parties themselves have otherwise agreed.¹ An agent must account to the principal for any secret profit received² and must disgorge any ill-gotten gains.³

Observation:

Any right to recover secret benefits received by an agent does not depend on any deceit of the agent but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal.⁴

A contract between a principal and an agent wherein the agent unjustly enriches him- or herself is not void where it is not made illegal by statute but is voidable at the election of the principal who enters into it without full knowledge of all the facts.⁵

Where, however, the agent has received the proceeds or profits of an act committed on behalf of and at the direction of the principal for which the principal is criminally responsible, the agent is under no duty to deliver the profits.⁶

CUMULATIVE SUPPLEMENT

Cases:

An agent or other fiduciary who deals with the subject matter of the agency so as to make a profit for himself or herself will be held to account in equity as trustee for all profits and advantages acquired by him or her in such dealings. *Litherland v. Jurgens*, 291 Neb. 775, 869 N.W.2d 92 (2015).

Daughter's transfers of money from mother's account to herself, her husband, her children, and her grandchildren while mother was still alive and owner of all funds in account was impermissible self-dealing, and was breach of daughter's fiduciary duty as attorney-in-fact; transactions involved mother's property during her lifetime and directly benefited daughter. *Wyman v. Bruckner*, 2018 SD 17, 908 N.W.2d 170 (S.D. 2018).

[END OF SUPPLEMENT]

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Footnotes

1 U.S. v. Miller, 997 F.2d 1010 (2d Cir. 1993) (applying New York law); Roberts v. Lomanto, 112 Cal. App. 4th 1553, 5 Cal. Rptr. 3d 866 (3d Dist. 2003); Connelly v. Special Road & Bridge Dist. No. 5, 99 Fla. 456, 126 So. 794, 71 A.L.R. 923 (1930); Schlesener v. Mott, 107 Kan. 41, 190 P. 745 (1920); Patmon v. Hobbs, 280 S.W.3d 589 (Ky. Ct. App. 2009); Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 178 N.W. 684, 13 A.L.R. 896 (1920); Tarnowski v. Resop, 236 Minn. 33, 51 N.W.2d 801 (1952); Conservatorship of Anderson v. Lasen, 262 Neb. 51, 628 N.W.2d 233 (2001); Tatsuno v. Kasai, 70 Utah 203, 259 P. 318, 62 A.L.R. 54 (1927); Nicolai v. Desilets, 185 Wash. 435, 55 P.2d 604 (1936).

In the conduct of his principal's business, an agent is held to the utmost good faith and will not be allowed to use his principal's property for his own advantage or to derive secret profits or advantages to himself

by reason of the relation of principal and agent existing between him and his principal. *Timberline Four Seasons Resort Management Co., Inc. v. Herlan*, 223 W. Va. 730, 679 S.E.2d 329 (2009).

Unless there is a full disclosure by the agent of his activity and interest in the transaction to the party he represents and the obtaining of the consent of the party represented, the agent cannot receive any profit or emolument from the transaction. *Government of Rwanda v. Johnson*, 409 F.3d 368 (D.C. Cir. 2005).

As to the duty not to use the principal's property for the agent's own purposes, see § 205.

2 Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage, 950 F.2d 60 (1st Cir. 1991) (applying Massachusetts law); *Johnson v. Pacific Lighting Land Co.*, 817 F.2d 601, 22 Fed. R. Evid. Serv. 1700 (9th Cir. 1987); *McKinney v. Christmas*, 143 Colo. 361, 353 P.2d 373 (1960); *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650 (1979); *Burton v. Burton*, 332 Mich. 326, 51 N.W.2d 297 (1952); *Tsutsui v. Barasch*, 67 A.D.3d 896, 892 N.Y.S.2d 400 (2d Dep't 2009); *Samples v. Maxson-Betts Co.*, 18 N.C. App. 359, 197 S.E.2d 71 (1973); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177 (Tex. App. Houston 1st Dist. 2005); *Bishop v. J. E. Crofts and Sons*, 545 P.2d 520 (Utah 1976); *General Automotive Mfg. Co. v. Singer*, 19 Wis. 2d 528, 120 N.W.2d 659 (1963).

3 U.S. v. Project on Gov't Oversight, 572 F. Supp. 2d 73 (D.D.C. 2008).

4 Roberts v. Lomanto, 112 Cal. App. 4th 1553, 5 Cal. Rptr. 3d 866 (3d Dist. 2003).

5 Ramsey v. Gordon, 567 S.W.2d 868 (Tex. Civ. App. Waco 1978), writ refused n.r.e., (Oct. 4, 1978).

6 Shenson v. Fresno Meat Packing Co., 96 Cal. App. 2d 725, 216 P.2d 156 (4th Dist. 1950).

3 Am. Jur. 2d Agency § 205

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Agency

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 205. Use of principal's property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  62(1) to 62(3), 65

Forms

Forms relating to use of principal's property, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Legal Forms 2d, Garages, Service Stations, and Parking Facilities [[Westlaw® Search Query](#)]

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An agent has a duty not to use the property of the principal for the agent's own purposes or those of a third party.¹

Observation:

"Property" of a principal is defined broadly and includes intangible as well as tangible assets.²

An agent who has possession of property of the principal has a duty to use it only on the principal's behalf unless the principal consents to such use.³ Thus, an agent must apply agency funds or property for the purposes of the agency,⁴ and the agent is under a duty not to apply them to any purpose not authorized by the terms of the agency.⁵ An agent who has received or collected money for the principal has a duty to notify the latter at once⁶ and should pay over such money to the principal as soon as, or within a reasonable time after, it is received or collected or apply or dispose of it according to the principal's directions.⁷

Termination of an agency relationship does not end an agent's duties regarding property of the principal.⁸ A former agent who continues to possess the property of a principal has a duty to return it and to comply with management and record-keeping rules.⁹ An agent who wrongfully obtains or continues to possess the property of a principal is not entitled to recover compensation for improvements the agent makes to the property.¹⁰

An agent is subject to liability to the principal for any profit made by the agent while using the principal's property when the use facilitates making the profit or otherwise for the value of the use.¹¹

By express or implied agreement, however, the agent may use the principal's funds for his or her own benefit and may treat the same as his or her own by an agreed change in the relationship from that of principal and agent to that of debtor and creditor.¹²

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Footnotes

- 1 Restatement Third, Agency § 8.05(1).
In the absence of special circumstances, money received by one in the capacity of agent are not the agent's, and the law implies a promise to pay them to the principal upon demand. *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP*, 201 Cal. App. 4th 368, 135 Cal. Rptr. 3d 69 (2d Dist. 2011).
As to an agent's duties of performance regarding the principal's property, see §§ 223 to 225.
- 2 Restatement Third, Agency § 8.05, comment b.
- 3 Restatement Third, Agency § 8.05, comment b.
As to when the principal's consent negates a breach of duty, see § 196.
- 4 *Tagg v. Bowman*, 108 Pa. 273, 1885 WL 11159 (1885); *Bills v. Hyde*, 49 S.D. 18, 205 N.W. 708 (1925).
- 5 *Guarente v. Ginsberg*, 101 N.H. 218, 138 A.2d 456 (1958); *New England Acceptance Corp. v. Nichols*, 110 Vt. 478, 8 A.2d 665 (1939).
- 6 *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956).
- 7 *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956); *Searle-Taylor Machinery Co., Inc. v. Brown Oil Tools, Inc.*, 512 S.W.2d 335 (Tex. Civ. App. Houston 1st Dist. 1974), writ refused n.r.e., (Dec. 11, 1974).
- 8 Restatement Third, Agency § 8.05, comment b.
As to the agent's duties upon termination, generally, see § 194.
- 9 Restatement Third, Agency § 8.05, comment b.
As to record-keeping duties, see § 225.
- 10 Restatement Third, Agency § 8.05, comment b.
- 11 Restatement Third, Agency § 8.05, comment b.

As to liability for obtaining secret profits, see § 204.

As to a third person's liability for property or funds wrongfully disposed of by an agent, see § 271.

12 New England Acceptance Corp. v. Nichols, 110 Vt. 478, 8 A.2d 665 (1939).

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3 Am. Jur. 2d Agency § 206

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 206. Using, or furnishing others with, confidential information

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(1), 69(8)

Forms

Forms relating to nondisclosure of confidential information, generally, see Am. Jur. Legal Forms 2d, Agency [Westlaw® Search Query]

An agent has a duty not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.¹

This rule applies not only to those communications which are stated to be confidential but also to information which the agent should know the principal would not care to have revealed to others or used in competition,² such as information that may pertain to the principal's business plans, personnel, nonpublic financial results, and operational practices.³ An agent's duty of confidentiality extends to all information concerning a principal, even when it is not otherwise connected with the subject matter of the agency relationship, including information that does not have competitive or other economic value.⁴

Observation:

An agent's duty of confidentiality is not absolute. An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party. Thus, an agent may reveal to law enforcement authorities that the principal is committing or is about to commit a crime. An agent's privilege to reveal such information also protects the agent's revelation to a private party who is being or will be harmed by the principal's illegal conduct.⁵

An agent's duties concerning confidential information do not end when the agency relationship terminates. An agent is not free to use or disclose a principal's trade secrets or other confidential information.⁶

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Footnotes

- 1 [Restatement Third, Agency § 8.05\(2\)](#).
As to the disclosure of confidential information by a dual agent to one of two principals, see § 211.
- 2 [Bancroft-Whitney Co. v. Glen](#), 64 Cal. 2d 327, 49 Cal. Rptr. 825, 411 P.2d 921, 24 A.L.R.3d 795 (1966) (disapproved of on other grounds by, [Frantz v. Johnson](#), 116 Nev. 455, 999 P.2d 351 (2000)).
- 3 [Restatement Third, Agency § 8.05](#), comment c.
- 4 [Restatement Third, Agency § 8.05](#), comment c.
- 5 [Restatement Third, Agency § 8.05](#), comment c.
As to whistleblowing, generally, see [Am. Jur. 2d, Wrongful Discharge](#) §§ 117 to 124.
- 6 [Restatement Third, Agency § 8.05](#), comment c.
As to an agent's duty to the principal after termination of the agency relationship, generally, see § 194.
As to the disclosure of trade secrets by a former employee, see [Am. Jur. 2d, Employment Relationship](#) §§ 177 to 180.

3 Am. Jur. 2d Agency § 207

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 207. Sale of agent's own property to principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(3)

An agent cannot sell to the principal unless the agent, in good faith, fully discloses to the principal all material facts surrounding the transaction, and the principal consents to the transaction.¹ This general rule applies although no positive fraud or unfairness may have been practiced by the agent and even though the agent was unable to sell to anyone else at the price fixed.²

No custom or private usage can override this rule,³ and in the absence of a full disclosure to the principal, a transaction in which an agent authorized to buy sells to the principal the agent's own property is voidable by the principal regardless of whether the transaction was fair and honest.⁴

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Footnotes

¹ *Weaver v. Lapsley*, 42 Ala. 601, 1868 WL 625 (1868); *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156 (1926); *Carmichael v. Lavengood*, 112 Ind. App. 144, 44 N.E.2d 177 (1942); *Hall v. Paine*, 224 Mass. 62, 112 N.E. 153 (1916); *Estate of Graham v. Morrison*, 168 N.C. App. 63, 607 S.E.2d 295 (2005).

² *Estate of Graham v. Morrison*, 168 N.C. App. 63, 607 S.E.2d 295 (2005).

³ *Hall v. Paine*, 224 Mass. 62, 112 N.E. 153 (1916).

⁴ *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156 (1926); *Osborne v. Keith*, 142 Tex. 262, 177 S.W.2d 198 (1944).

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3 Am. Jur. 2d Agency § 208

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

a. Duty Not to Act Adversely

§ 208. Purchasing agent buying subject matter for himself

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  69(5), 69(6)

A.L.R. Library

[Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself](#), 20 A.L.R.2d 1140

Forms

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

One who is employed as an agent to purchase property for the principal is under a duty not to purchase such property for his or her own account or benefit unless the principal has full knowledge of the transaction and freely consents thereto.¹ This general

rule applies although no positive fraud or unfairness may have been practiced by the agent and although the agent purchases the property at a fair market price or at the price set by the principal.² Where the agent makes the purchase for him- or herself, all the profits and advantages gained in the transaction belong to the principal, and the agent will be held to have taken the property as trustee for the principal.³

After the agency is terminated and the fact thereof has been brought home to the principal, the agent may, in some circumstances at least, purchase for him- or herself the property the agent was to have purchased for the principal, such as where the agent would not be taking unfair advantage of the former agency relationship,⁴ although there is also authority to the effect that even after termination of the relationship, the agent must give the principal a reasonable time within which to make the purchase before making it.⁵

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Footnotes

- 1 Russell v. Republic Production Co., 112 F.2d 663 (C.C.A. 5th Cir. 1940); Kurtz v. Farrington, 104 Conn. 257, 132 A. 540, 48 A.L.R. 259 (1926); Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610, 20 A.L.R.2d 1136 (1950); Groh v. Shelton, 428 S.W.2d 911 (Mo. Ct. App. 1968); Estate of Graham v. Morrison, 168 N.C. App. 63, 607 S.E.2d 295 (2005); Bergner v. Bergner, 219 Pa. 113, 67 A. 999 (1907).
- 2 Estate of Graham v. Morrison, 168 N.C. App. 63, 607 S.E.2d 295 (2005).
- 3 Doyle v. Maruszczak, 834 So. 2d 307 (Fla. 5th DCA 2003).
As to the effect of an agency relationship upon the parties to a constructive trust, see Am. Jur. 2d, Trusts § 191.
- 4 George Poy v. Allan, 231 Mich. 472, 204 N.W. 82 (1925), aff'd, 235 Mich. 515, 209 N.W. 588 (1926).
- 5 Sentell v. Richardson, 211 La. 288, 29 So. 2d 852 (1947).
As to an agent's duty to the principal after termination of the agency relationship, generally, see § 194.

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3 Am. Jur. 2d Agency § 209

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

b. Duty Not to Act for Adverse Party; Dual Agency

§ 209. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  70

Forms

Forms relating to secret commissions or concealed profits, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.¹ Moreover, all agents, even those whose assigned work does not involve the assessment or pursuit of business opportunities, have a fiduciary duty to the principal not to give the opportunity to a third person when either the nature of the opportunity or the circumstances under which the agent learned of it require that the agent offer the opportunity to the principal.²

The duty not to act as or for an adverse party requires that an agent disclose adverse interests to the principal so that the principal may evaluate how best to protect its interests in light of the agent's interest.³ Each of the principals is under an equal duty to exercise ordinary care in selecting and supervising the agent to protect its own interests.⁴

The breadth of the duty not to act as or for an adverse party makes it unnecessary for a principal to prescribe its agents' duties and prohibit outside interests that its agents may have or acquire with great specificity in formulating the initial terms of its relationship with its agents.⁵

The duty not to act as or for an adverse party does not apply to a transaction that occurs prior to or after termination of an agency relationship unless the prior or former agent otherwise has a confidential relationship with the principal.⁶

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Footnotes

- 1 Restatement Third, Agency § 8.03.
As to tort liability, in a dual agency situation, of one principal to the other for acts of the agent, see § 245.
As to the imputation of knowledge of the agent to both principals when the agent is acting as a dual agent, see § 265.
As to the representation of both parties by brokers, see Am. Jur. 2d, Brokers § 128.
- 2 Restatement Third, Agency § 8.02, comment d.
- 3 Restatement Third, Agency § 8.03, comment b.
- 4 Eagle Jets, LLC v. Atlanta Jet, Inc., 740 S.E.2d 439 (Ga. Ct. App. 2013).
- 5 Restatement Third, Agency § 8.03, comment b.
- 6 Restatement Third, Agency § 8.02, comment c.

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3 Am. Jur. 2d Agency § 210

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

b. Duty Not to Act for Adverse Party; Dual Agency

§ 210. When agent is subject to duty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  70

Forms

Forms relating to secret commissions or concealed profits, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

The duty not to act as or for an adverse party is formulated broadly; so long as the transaction in which an agent acts as or on behalf of an adverse party is connected with the agency relationship, the agent is subject to the duty although the agent does not have direct or indirect responsibility for conducting the transaction on behalf of the principal.¹ However, a principal's agent who performs only ministerial acts for another does not become a dual agent.²

An agent is deemed to act as or for an adverse party in a transaction when the agent has a substantial economic interest in the party with whom the principal deals. An agent's interest may also be adverse to the principal's interest when a transaction is between the principal and an associate of the agent's, such as a close friend or relative.³

Footnotes

- 1 Restatement Third, Agency § 8.03, comment b.
- 2 Restatement Third, Agency § 8.03, comment b.
- 3 Restatement Third, Agency § 8.03, comment c.

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3 Am. Jur. 2d Agency § 211

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

b. Duty Not to Act for Adverse Party; Dual Agency

§ 211. Knowledge and consent or acquiescence of principals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  70

Forms

Forms relating to secret commissions or concealed profits, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

Conduct by an agent that would otherwise constitute a breach of the duty of loyalty¹ does not constitute a breach if the principal consents to the conduct provided that:

(1) an agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal

(b) to disclose to each principal (i) the fact that the agent acts for the other principal or principals, and (ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.²

If the agent wishes to disclose to the principal the agent's position or interest in the transaction prior to concluding the transaction, the agent's duty of good faith to the principal requires the agent to make the disclosure in sufficient time to enable the principal to determine whether to proceed with the transaction, having had the opportunity to evaluate the significance of the agent's interest and to make any other arrangements warranted in the principal's judgment.³ When the principal is an organization, such disclosure by an agent—whether employed within the organization or situated externally—should be made to an agent designated by the organization who is disinterested in the transaction, and the agent's disclosure should comply with any applicable rules prescribed by the organization itself.⁴

If an agent acts on behalf of more than one principal in a transaction between or among them and the principals know of the agent's dual or multiple representation, the agent owes duties of good faith, disclosure, and fair dealing to all of the principals.⁵ In matters involving a dual agency, the agent must act with a heightened sense of duty and conduct to assure that he or she serves both masters' interests fully.⁶ If an agent's duties of confidentiality to one principal prevent the agent from fulfilling the duties of disclosure that the agent owes to any other principal, the agent breaches the agent's duties by continuing to act on behalf of the principal or principals to whom the agent may not make the required disclosure.⁷

An agent who acts for two or more different principals does not bind all principals by a statement made within the scope of the agent's employment for only one of them.⁸

CUMULATIVE SUPPLEMENT

Cases:

Michigan law will not permit an agent to act in a dual capacity in which his interest conflicts with his duty, without a full disclosure of the facts to his principal. [Mike Vaughn Custom Sports, Inc. v. Piku](#), 15 F. Supp. 3d 735 (E.D. Mich. 2014).

[END OF SUPPLEMENT]

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Footnotes

1 [§§ 198 to 212](#).

2 [Restatement Third, Agency § 8.06\(2\)](#).

A dual agency is not per se against public policy. [PMH Properties v. Nichols](#), 263 N.W.2d 799 (Minn. 1978).

As to the right of compensation of a dual agent who acts with knowledge and consent of the principals, see [§ 239](#).

[Restatement Third, Agency § 8.06](#), comment d(1).

4 [Restatement Third, Agency § 8.06](#), comment d(1).

[Restatement Third, Agency § 8.06](#), comment d(2).

[Whalen v. Bistes](#), 45 So. 3d 290 (Miss. Ct. App. 2010).

[Restatement Third, Agency § 8.06](#), comment d(2).

As to the duty to provide confidential information, see [§ 206](#).

8 [Chevron Corp. v. Salazar](#), 807 F. Supp. 2d 189 (S.D. N.Y. 2011).

3 Am. Jur. 2d Agency § 212

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Agency

John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Jill Gustafson, J.D., and Lucas Martin, J.D.

X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

2. Duties of Loyalty

b. Duty Not to Act for Adverse Party; Dual Agency

§ 212. Remedies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  70

Forms

Forms relating to secret commissions or concealed profits, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

In many cases, an agent's contravention of the duty not to act as or for an adverse party leads to forfeiture of commissions otherwise due the agent by the principal or principals on whose behalf the agent acted.¹

An agent's breach of duty also subjects the agent to liability for loss caused the principal and to liability for benefits acquired by the agent.²

An agent's undisclosed self-dealing is a basis on which the principal may avoid the transaction with the agent.³

If an agent represents multiple principals in a transaction between or among them, any principal who does not know of the agent's divided loyalties may rescind the transaction.⁴

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Footnotes

- 1 [Restatement Third, Agency § 8.03](#), comment d.
As to the forfeiture of compensation as a remedy, see [§ 197](#).
- 2 [Restatement Third, Agency § 8.03](#), comment d.
As to the recovery for monetary relief, see [§ 197](#).
- 3 [Restatement Third, Agency § 8.03](#), comment d.
- 4 [Restatement Third, Agency § 8.03](#), comment d.

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3 Am. Jur. 2d Agency § 213

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 213. Duty created by contract

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 48, 50, 51

Forms

Forms relating to performance bond, generally, see Am. Jur. Legal Forms 2d, Agency [[Westlaw® Search Query](#)]

Although a contract is not necessary to create a relationship of agency,¹ many agents and principals enter into agreements.² Where a contract is entered into between the agent and the principal, an agent has a duty to act in accordance with the express and implied terms of the contract.³

Contract-law principles of general applicability govern whether such agreements are enforceable and how they are to be interpreted, among other questions.⁴ A power of attorney should be construed using the same rules of construction generally applicable to contracts and other written instruments except to the extent that the fiduciary relationship between the principal and the agent requires otherwise.⁵

CUMULATIVE SUPPLEMENT

Cases:

Agency relationship involves both contractual and fiduciary relationship, and interpretation of agent's authority is governed by rules for construing contracts, except to the extent fiduciary relationship requires a different rule. [Restatement \(Third\) of Agency § 8.07](#). *Estate of Vizenor ex rel. Vizenor v. Brown*, 2014 ND 143, 851 N.W.2d 119 (N.D. 2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 As to the creation and existence of an agency relationship, see §§ [14](#) to [19](#).
- 2 Restatement Third, Agency § 8.07, comment b.
- 3 Restatement Third, Agency § 8.07.
- 4 Restatement Third, Agency § 8.07, comment b.
- 5 *State v. Barendt*, 2007 ND 164, 740 N.W.2d 87 (N.D. 2007); *Tennessee Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743 (Tenn. 2007).
As to the general fiduciary principle, see §§ [192](#), [193](#).

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3 Am. Jur. 2d Agency § 214

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 214. Duties of care, competence, and diligence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 61(1), 61(2)

Forms

Forms relating to the obligations of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to lack of skill or judgment of agent, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.¹ A principal and an agent may establish benchmarks or other measures for the effort and skill to be expected from the agent. A contract may also, in appropriate circumstances, raise or lower the standard of performance to be expected of an agent or specify the remedies or mechanisms of dispute resolution available to the principal.²

Only a reasonable degree of care is required.³ Although an agent has a duty of diligence, that duty is to make reasonable efforts to achieve a result and not a duty to achieve the result regardless of the effort, risk, and cost involved. If an agent makes a reasonable effort, the agent is not subject to liability to the principal if the effort fails to accomplish the end desired by the principal.⁴

The specific skills that an agent must possess to be competent depend on the nature of the service that the agent undertakes to provide and the circumstances under which it will be provided, such as the magnitude and complexity of transactions that the agent will conduct on the principal's account.⁵ If an agent undertakes to perform services as a practitioner of a trade or profession, the agent is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities unless the agent represents that the agent possesses greater or lesser skill.⁶

An agent's duty of diligence requires the agent to bring the agent's competence to bear on matters undertaken on behalf of the principal. Ordinarily, the scope of an agent's duty to be diligent is limited by the scope of the services the agent undertakes to perform for the principal, which may be expanded by contract or by the existence of a special relationship of trust and confidence between agent and principal.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.08.
As to the duty of care of a principal's property, see § 223.
- 2 Restatement Third, Agency § 8.08, comment b.
- 3 De Bavier v. Funke, 21 N.Y.S. 410 (Gen. Term 1892), aff'd, 142 N.Y. 633, 37 N.E. 566 (1894).
- 4 Restatement Third, Agency § 8.08, comment d.
- 5 Restatement Third, Agency § 8.08, comment c.
- 6 Restatement Third, Agency § 8.08, comment c.
As to agents with special skills, see § 216.
- 7 Restatement Third, Agency § 8.08, comment d.

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3 Am. Jur. 2d Agency § 215

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 215. Duties of care, competence, and diligence—Gratuitous agents

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 61(1), 61(2)

Forms

Forms relating to the obligations of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to lack of skill or judgment of agent, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

In general, the standard of care applicable to a gratuitous agent should reflect what it is reasonable to expect under the circumstances. Relevant circumstances include the skill, experience, and professional status that the agent has or purports to have. It is also relevant whether the principal is aware of any limitations or shortcomings in the agent's skills. Thus, providing a service gratuitously may subject an agent to duties of competence and diligence to the principal that do not differ from the duties owed a principal who agrees to compensate the agent.¹

Observation:

A gratuitous agent is subject to the general fiduciary principle² and to the specific duties of loyalty.³

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Footnotes

- 1 [Restatement Third, Agency § 8.08](#), comment e.
- 2 [§§ 192, 193](#).
- 3 [Restatement Third, Agency § 8.08](#), comment e.
As to the specific duties of loyalty, see §§ [198](#) to [212](#).

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3 Am. Jur. 2d Agency § 216

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 216. Duties of care, competence, and diligence—Agents with special skills

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 61(1), 61(2)

Forms

Forms relating to the obligations of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to lack of skill or judgment of agent, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.¹

An agent's level of skill or knowledge may exceed the norm for similarly situated agents. Alternatively, an agent may falsely represent that this is so. An agent's performance should be evaluated consistently with the agent's claimed level of skill or knowledge unless the agent establishes that the principal knew the agent's claim to be false.²

Observation:

It is of no consequence that the agent's services were gratuitous rather than compensated.³

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Footnotes

1 Restatement Third, Agency § 8.08.

2 Restatement Third, Agency § 8.08, comment c.

3 *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897).

As to the degree of care required of gratuitous agents, generally, see § 215.

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3 Am. Jur. 2d Agency § 217

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A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 217. Duty to act within actual authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 50

An agent has a duty to take action only within the scope of the agent's actual authority.¹ If an agent takes action beyond the scope of the agent's actual authority, the agent is subject to liability to the principal for loss caused the principal, including costs the principal incurs in defending against lawsuits brought against the principal by third parties.²

If an agent's action beyond the scope of the agent's actual authority causes loss to the principal, the agent is subject to liability to the principal for that loss even though the loss would have been greater had the agent acted consistently with the agent's actual authority. Were the rule otherwise, an agent might be tempted to act or to continue to act without actual authority in the hope that matters will turn out sufficiently well that the principal will not suffer a loss. Moreover, the underlying premise of a relationship of agency is action by the agent that is consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal.³

However, an agent's departure from the scope of actual authority does not impose on the agent the risk of all losses that the principal may subsequently suffer. Upon learning that an agent has acted without actual authority or has failed to act as the principal directed or wished, the principal's right to be indemnified against subsequent losses by the agent does not extend to loss that the principal could have avoided. Subjecting an agent to liability for all losses suffered by a principal once the principal has notice that the agent has acted without authority would make the agent a guarantor of subsequent speculation by the principal.⁴

Mitigation does not require that a principal undertake measures beyond those that are reasonable to avoid subsequent losses. A principal's ability to mitigate loss caused by an agent's unauthorized activity may be stymied when the agent continues to hold the assets needed to mitigate. Moreover, it is unreasonable to expect a principal to attempt to mitigate by permitting the agent

to continue to deal on the principal's behalf when the agent's disregard for the scope of authorized action causes the principal to lose confidence in the agent's fidelity to the principal's wishes.⁵

If an agent takes action beyond the scope of the agent's actual authority, the agent is not subject to liability to the principal if the principal ratifies the agent's action.⁶

Observation:

By taking action beyond the scope of actual authority, an agent may become subject to the duty to provide information to the principal that is material to the principal.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.09(1).
As to the actual authority of an agent, see §§ 66 to 70.
- 2 Restatement Third, Agency § 8.09, comment b.
- 3 Restatement Third, Agency § 8.09, comment b.
- 4 Restatement Third, Agency § 8.09, comment b.
- 5 Restatement Third, Agency § 8.09, comment b.
- 6 Restatement Third, Agency § 8.09, comment b.
As to ratification, see §§ 167 to 191.
- 7 Restatement Third, Agency § 8.09, comment b.
As to the duty to disclose information to the principal, see § 222.

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3 Am. Jur. 2d Agency § 218

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 218. Duty to comply with principal's lawful instructions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 50

An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal.¹ Within a relationship of agency, a principal always has the power to provide an agent with interim instructions concerning an action to be taken on the principal's behalf.²

A principal and an agent may agree that the principal will not give interim instructions or otherwise interfere with the agent's exercise of discretion. If so, the principal's subsequent statement of an interim instruction may breach contractual duties owed by the principal to the agent and subject the principal to liability to the agent.³ However, even though the principal and agent have previously agreed otherwise, an agent has a duty to comply with lawful instructions received from the principal. This is so although the agent believes that doing otherwise would be better for the principal.⁴

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Footnotes

1 Restatement Third, Agency § 8.09(2).

2 Restatement Third, Agency § 8.09, comment c.

3 Restatement Third, Agency § 8.09, comment c.

4 Restatement Third, Agency § 8.09, comment c.

3 Am. Jur. 2d Agency § 219

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 219. Duty to comply with principal's lawful instructions—Interpreting instructions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 50

In interpreting instructions received from a principal, the agent's interpretation must be reasonable, determined from the standpoint of a reasonable person in the agent's position under all the circumstances of which the agent has notice, including the principal's current circumstances.¹ This places upon the principal the burden of reasonable mistakes made by the agent in the interpretation of his or her authorization caused by facts of which the agent had no notice.²

If an instruction is unambiguous, unless an agent has reason to believe that the principal does not intend the instruction as stated or wishes the agent to reconfirm it, the agent has no duty to press the principal for additional confirmation of the principal's intentions.³ Where the principal's instructions are clear, precise, and imperative, the agent should follow them strictly and exactly,⁴ and a violation of definite instructions cannot be excused by a custom or usage in the business.⁵

When an agent determines not to comply with an instruction, the agent has a duty to so inform the principal.⁶

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Footnotes

¹ Restatement Third, Agency § 8.09, comment c.

² Standard Acc. Ins. Co. of Detroit, Mich. v. Ayres, 217 Ind. 422, 28 N.E.2d 50 (1940).

³ Restatement Third, Agency § 8.09, comment c.

⁴ Theis v. duPont, Glore Forgan Inc., 212 Kan. 301, 510 P.2d 1212 (1973); R. Rowland & Co., Inc. v. Leahy, 561 S.W.2d 115 (Mo. 1978).

5 Theis v. duPont, Glore Forgan Inc., 212 Kan. 301, 510 P.2d 1212 (1973).
6 Restatement Third, Agency § 8.09, comment c.

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3 Am. Jur. 2d Agency § 220

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 220. Duty to comply with principal's lawful instructions—When agent has no duty to comply

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 50

An agent has no duty to comply with instructions that may subject the agent to criminal, civil, or administrative sanctions or that exceed the legal limits on the principal's right to direct action taken by the agent. Thus, an agent has no duty to comply with a directive to commit a crime or an act the agent has reason to know will be tortious.¹

An agent who is a member of a profession does not have a duty to follow instructions given by the principal that expose the agent to discipline for violating professional rules.²

A contract provision in which an agent promises to perform an unlawful act is unenforceable.³

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Footnotes

- 1 Restatement Third, Agency § 8.09, comment c.
- 2 Restatement Third, Agency § 8.09, comment c.
- 3 Restatement Third, Agency § 8.09, comment c.

3 Am. Jur. 2d Agency § 221

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A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 221. Duty of good conduct

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 50-50

An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise.¹ A contract between a principal and an agent may prescribe standards for the agent's conduct that expand, contract, or coincide with the limits established by common-law agency. An agent who breaches the agent's duty of good conduct is subject to liability to the principal, including liability for breach of contract to the extent that the breach contravenes an express or implied term of the contract and causes any damages to the principal.² If an agent breaches the duty of good conduct, it is not a defense that the agent's performance has otherwise been satisfactory to the principal.³

The typical remedy for breach of the duty of good conduct is discharge or termination even when an agent has a contract that assures the agent of employment or appointment for a fixed term of employment.⁴

Observation:

Conduct by a principal that provokes an intemperate response from an agent may justify the agent's response and preclude the principal's right to treat the agent's conduct as a breach of duty.⁵

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Footnotes

- 1 Restatement Third, Agency § 8.10.
- 2 Restatement Third, Agency § 8.10, comment b.
- 3 Restatement Third, Agency § 8.10, comment b.
- 4 Restatement Third, Agency § 8.10, comment b.
- 5 Restatement Third, Agency § 8.10, comment b.

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3 Am. Jur. 2d Agency § 222

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 222. Duty to provide information to principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 68

Trial Strategy

[Real-Estate Broker's Breach of Fiduciary Duty to Seller-Principal by Failing to Disclose Material Facts About or Certain Dealings with Purchaser](#), 65 Am. Jur. Proof of Facts 3d 109
[Real-Estate Broker's Breach of Fiduciary Duty to Disclose Material Facts to Seller-Principal](#), 101 Am. Jur. Trials 1

Forms

Forms relating to submission of records or exchange of information, generally, see Am. Jur. Legal Forms 2d, Agency [Westlaw® Search Query]

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when:

(1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and

(2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.¹

The agent's duty is satisfied if the agent uses reasonable effort to provide the information, acting reasonably and consistently with any directions furnished by the principal, and the principal has the burden of establishing that the agent's conduct breached the duty.²

Ordinarily, an agent does not have a duty to furnish information to the principal until an agency relationship has been formed.³ However, the duty to deal fairly may require a prospective agent to furnish the prospective principal with information that is not otherwise reasonably available and that is material to the principal's decision whether to engage the agent.⁴

A principal has a right to rely on advice given by an agent and on the agent's accurate transmission of material information to the principal. It is not a defense to an agent's breach of duty to transmit material information that the principal could, through investigation, have ascertained the truth independently.⁵ When an agent deliberately withholds material information from the principal to further the agent's own purposes, the agent's conduct is inconsistent with the agent's fiduciary duty to act loyally for the principal's benefit.⁶

If an agent breaches the duty to provide information to the principal, the agent is subject to liability to the principal for loss caused the principal by the agent's breach. The agent's breach may also be a basis on which to terminate the agent's authority to act on the principal's behalf. Additionally, if the agent's breach of duty breaches an express or implied term of a contract between the agent and the principal, the agent is subject to liability for breach of contract.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.11.
As to the disclosure of information upon termination of the agency relationship, see § 194.
As to the disclosure of a dual agency, see § 211.
As to the loss of compensation for failure to disclose information, see § 237.
- 2 Restatement Third, Agency § 8.11, comment b.
- 3 Restatement Third, Agency § 8.11, comment c.
As to the creation and existence of an agency relationship, see §§ 14 to 19.
- 4 Restatement Third, Agency § 8.11, comment c.
- 5 Restatement Third, Agency § 8.11, comment d.
- 6 Restatement Third, Agency § 8.11, comment d.
As to the general fiduciary principle, see §§ 192, 193.
- 7 Restatement Third, Agency § 8.11, comment b.

3 Am. Jur. 2d Agency § 223

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 223. Duty of care regarding principal's property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 62(1) to 62(3), 63(1), 64(1), 65, 67

Forms

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

An agent has a duty, subject to any agreement with the principal, not to deal with the principal's property so that it appears to be the agent's property.¹ When an agent possesses or controls property of the principal, the agent is subject to duties of management that may be defined by agreement.²

If the agent receives property for the principal, the agent's duty is to use due care to safeguard it pending delivery to the principal.³ On the other hand, an agent is not an insurer, and an agent who uses care, skill, and integrity in the preservation of the principal's property will not be responsible for an entirely unforeseeable result.⁴ Moreover, even an agent who is under a duty to look after and take care of the principal's property is not obligated to do so at his or her own expense.⁵

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Footnotes

- 1 Restatement Third, Agency § 8.12(1).
- 2 Restatement Third, Agency § 8.12, comment b.
- 3 Restatement Third, Agency § 8.12, comment b.
- 4 Deep Blue Ventures, Inc. v. Manfra, Tordella & Brookes, Inc., 6 Misc. 3d 727, 791 N.Y.S.2d 298 (Sup 2004).
- 5 Gay v. American Trading Co., 185 Ky. 305, 215 S.W. 73 (1919).

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3 Am. Jur. 2d Agency § 224

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 224. Duty of care regarding principal's property—Conversion or commingling

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 62(1) to 62(3), 63(1), 64(1), 65

Forms

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

An agent has a duty, subject to any agreement with the principal, not to mingle the principal's property with anyone else's.¹ If an agent acquires any asset on behalf of the principal, the agent's duty is to have the asset titled in the principal's name or otherwise to arrange a clear indication that the principal owns the asset.² Likewise, an agent who acquires money on behalf of a principal may not ordinarily place it to the agent's own credit in a bank account.³

However, an agent and a principal may agree that the agent may use the principal's property in a manner that creates the appearance that it is the agent's property.⁴ Or an agent and a principal may agree that an agent does not have a duty to segregate

funds received on the principal's account. Such an agreement may be express or may be based on custom or practices in a particular industry known to both the principal and the agent.⁵

The mere commingling of the agent's own funds with those of the principal does not make the agent the owner of the principal's money.⁶ Thus, even when funds held by an agent are commingled with the knowledge and consent of the principal, in the absence of an agreement to the contrary, the inference is that the agent becomes a debtor to the amount received for the principal.⁷

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Footnotes

1 Restatement Third, Agency § 8.12(2).

2 Restatement Third, Agency § 8.12, comment c.

3 Restatement Third, Agency § 8.12, comment c.

4 Restatement Third, Agency § 8.12, comment c.

5 Restatement Third, Agency § 8.12, comment c.

6 Succession of Onorato, 219 La. 1, 51 So. 2d 804, 24 A.L.R.2d 656 (1951).

7 Downey v. Humphreys, 102 Cal. App. 2d 323, 227 P.2d 484 (2d Dist. 1951); McFarling v. Demco, Inc., 1976 OK 15, 546 P.2d 625 (Okla. 1976).

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3 Am. Jur. 2d Agency § 225

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X. Rights, Duties, and Liabilities Between Principal and Agent

A. Duties of Agent; Liability of Agent to Principal

3. Duties of Performance

§ 225. Duty of care regarding principal's property—Duty to keep records and render accounts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 63(1), 64(1), 65, 66

A.L.R. Library

[Availability of equitable remedy of accounting between principal and agent](#), 3 A.L.R.2d 1310

Forms

Forms relating to collection of payments or consigned stock, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to money collected for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to proceeds from the sale of goods for principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

An agent has a duty, subject to any agreement with the principal, to keep and render accounts to the principal of money or other property received or paid out on the principal's account.¹

This duty requires the agent to maintain records of dealings on the principal's behalf and provide them to the principal upon demand. If an agent has reason to know that the principal is unaware of a transaction for which the agent should account, such as a sale or a collection, the agent has a duty to account to the principal without demand.² Language granting a fiduciary authority to dispose of property in the same manner that the principal could do personally does not equate to an unrestricted power of disposition as a far more detailed exculpation of an agent from a duty to account is necessary to exonerate a fiduciary from such obligations.³

The burden to render an accounting is on the fiduciary once the principal has shown that funds have been entrusted to the fiduciary and not paid over or otherwise accounted for.⁴

An agent who fails to account for the principal's funds may be liable for conversion⁵ or unjust enrichment.⁶

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Footnotes

¹ Restatement Third, Agency § 8.12(3).

As to the duty to account after termination of the agency relationship, see § 194.

As to an action against an agent for an accounting, see § 303.

² Restatement Third, Agency § 8.12, comment d.

³ French v. Wachovia Bank, Nat. Ass'n, 800 F. Supp. 2d 975 (E.D. Wis. 2011) (applying Wisconsin law).

⁴ Andrews Farms v. Calcot, Ltd., 693 F. Supp. 2d 1154 (E.D. Cal. 2010) (applying California law).

⁵ Alexopoulos v. Dakouras, 48 Wis. 2d 32, 179 N.W.2d 836 (1970).

As to the conversion or commingling of agency funds, generally, see § 224.

⁶ Gold v. Rowland, 296 Conn. 186, 994 A.2d 106 (2010).

3 Am. Jur. 2d Agency X B Refs.

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 47, 77, 81 to 85

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Personal Liability

A.L.R. Index, Principal and Agent

West's A.L.R. Digest, [Principal and Agent](#) 47, 77, 81 to 85

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3 Am. Jur. 2d Agency § 226

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

1. In General

§ 226. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 47

Forms

Forms relating to obligations of principal, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to rights duties and liabilities of principal to agent, generally, see Am. Jur. Pleading and Practice Forms, Agency[\[Westlaw® Search Query\]](#)

Although a principal owes an agent a duty to deal fairly and in good faith,¹ a principal does not owe an agent a fiduciary duty.²

Absent a contractual provision, there is no general duty to supervise an agent³ although a principal does have a duty to supervise an agent with reasonable care once the principal knows or has reason to know that such a person has behaved in a dangerous or otherwise incompetent manner.⁴

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Footnotes

¹

[§ 228.](#)

- 2 Universal Trading & Inv. Co., Inc. v. Bureau for Representing Ukrainian Interests in Intern. and Foreign
Courts, 898 F. Supp. 2d 301 (D. Mass. 2012) (applying Massachusetts law); MDM Group Associates, Inc.
v. CX Reinsurance Co. Ltd., 165 P.3d 882 (Colo. App. 2007).
As to the general fiduciary principle owed by an agent to a principal, see §§ 192, 193.
- 3 Jackson Nat. Life Ins. Co. v. Workman Securities Corp., 803 F. Supp. 2d 1006 (D. Minn. 2011) (applying
Minnesota law).
- 4 Godfrey v. Iverson, 503 F. Supp. 2d 363 (D.D.C. 2007), aff'd, 559 F.3d 569 (D.C. Cir. 2009) (applying
District of Columbia law).

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3 Am. Jur. 2d Agency § 227

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

1. In General

§ 227. Contractual duties

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 47

Forms

Forms relating to rights duties and liabilities of principal to agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Although an agency relationship may exist in the absence of a contract between a principal and an agent,¹ where a contract does exist, a principal has a duty to act in accordance with the express and implied terms of the contract.² Every contract of agency carries with it an implied obligation on the part of the principal to do nothing that would thwart the effectiveness of the agency.³ On the other hand, the principal may be relieved of contractual obligations by the agent's prior breach of the contract.⁴

A principal's implied contractual duty of good faith and fair dealing obliges the principal to refrain from unreasonable interference with the agent's completion of work.⁵ However, unless otherwise agreed, a principal is not subject to a general duty to refrain from competition with the agent that does not interfere with the agent's ability to achieve the standards set by the contract.⁶

In general, a principal's breach of a contractual duty owed the agent subjects the principal to liability for breach of contract.⁷ The principal has a duty to indemnify the agent against loss that the agent suffers as a consequence of the principal's breach of the duty to deal with the agent fairly and in good faith.⁸

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Footnotes

- 1 Restatement Third, Agency § 8.13, comment b.
- 2 Restatement Third, Agency § 8.13.
- 3 Advanced Neurological Care, P.C. v. State Farm Mut. Auto. Ins. Co., 38 Misc. 3d 750, 956 N.Y.S.2d 416 (Dist. Ct. 2012).
- 4 Updike v. Oakland Motor Car Co., 229 A.D. 632, 242 N.Y.S. 329 (1st Dep't 1930).
- 5 Restatement Third, Agency § 8.13, comment b.
- 6 Restatement Third, Agency § 8.13, comment b.
- 7 As to the agent's duty to refrain from competition with the principal, see §§ 201 to 203.
- 8 Restatement Third, Agency § 8.13, comment b.
- 9 Restatement Third, Agency § 8.13, comment b.
- 10 As to indemnification of an agent by the principal, see §§ 229, 232.

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3 Am. Jur. 2d Agency § 228

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

1. In General

§ 228. Duty to deal fairly and in good faith

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 47

A principal has a duty to deal with an agent fairly and in good faith, including a duty to provide the agent with information about risks of physical harm or pecuniary loss that the principal knows, has reason to know, or should know are present in the agent's work but are unknown to the agent.¹

A principal's duty to deal with the agent fairly and in good faith obliges the principal to refrain from engaging in conduct that will foreseeably result in loss for the agent when the agent's own conduct is without fault.²

The duty to provide information to the agent does not require the principal to provide an agent with all the information known to the principal about a product that the agent sells on the principal's behalf. The principal's duty is limited to information material to the agent's professional reputation or risk of pecuniary loss to third parties with whom the agent deals on the principal's behalf.³ A principal has an implied duty to forward notices to its agent in cases where the principal intends to have an agent act on its behalf.⁴

Although a principal is not subject to a duty of loyalty to an agent, the principal's duty to deal with an agent fairly and in good faith requires that the principal refrain from conduct that is likely to injure the agent's business reputation through the agent's association with the principal. Likewise, a principal has a duty to refrain from conduct that will injure the agent's reasonable self-respect if the association continues.⁵ The nature of the agent's work and other circumstances of the relationship are relevant to whether a principal's conduct breaches this duty.⁶

Footnotes

- 1 Restatement Third, Agency § 8.15.
An aircraft manufacturer did not breach an implied covenant of good faith and fair dealing by allegedly representing that its representation agreement with an electronics company would be renewed while simultaneously seeking a new representative in Kuwait where the agreement allowed for nonrenewal, and the manufacturer was under no obligation to renew. *Al-Khaldiya Electronics and Elec. Equipment Co. v. Boeing Co.*, 571 F.3d 754 (8th Cir. 2009) (applying Missouri law).
- 2 Restatement Third, Agency § 8.15, comment b.
A publisher's alleged interference with an independent sales representative's marketing efforts and its purported competition with him for business within his territory did not breach the sales representative agreement, absent an allegation that the representative suffered any damage as a result of the publisher's actions. *Kelly v. McGraw-Hill Companies, Inc.*, 865 F. Supp. 2d 912 (N.D. Ill. 2012) (applying Illinois law).
- 3 Restatement Third, Agency § 8.15, comment c.
- 4 Advanced Neurological Care, P.C. v. State Farm Mut. Auto. Ins. Co., 38 Misc. 3d 750, 956 N.Y.S.2d 416 (Dist. Ct. 2012).
- 5 Restatement Third, Agency § 8.15, comment d.
- 6 Restatement Third, Agency § 8.15, comment d.

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3 Am. Jur. 2d Agency § 229

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

2. Reimbursement and Indemnification

§ 229. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 77, 85

Forms

Forms relating to responsibility of agent for maintenance and expenses, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to effect of termination, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to reimbursement and indemnification, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

A principal has a duty to indemnify an agent in accordance with the terms of any contract between them and, unless otherwise agreed:

(1) when the agent makes a payment (a) within the scope of the agent's actual authority, or (b) that is beneficial to the principal, unless the agent acts officially in making the payment; or

(2) when the agent suffers a loss that fairly should be borne by the principal in light of their relationship.¹

A contract between a principal and an agent may anticipate the possibility that the agent will incur pecuniary losses, specify when and to what extent the principal has a duty to indemnify the agent, and prescribe procedures to be followed by the agent

in claiming rights to indemnity under the contract.² An agent who signs an indemnity agreement as an agent of the disclosed principal is not subject to shared liability with his or her principal.³

In the absence of a contract, a principal has duties to indemnify the agent if the agent acts with actual authority in making a payment to a third party unless otherwise agreed.⁴ Although a principal's duty to indemnify extends to subagents, the principal is not subject to liability on an appointing agent's promise to pay compensation to a subagent or to its employees unless the principal has agreed otherwise.⁵

A principal's duty to indemnify an agent may arise after the agency relationship is terminated whether or not the duty is based on a contract between principal and agent.⁶

The statute of limitations runs in the principal's favor only from the time of payment by the agent.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.14.
An agent acts officially in making a payment without actual authority when, under the circumstances, the agent's action was not excusable. *Restatement Third, Agency § 8.14*, comment b.
- 2 Restatement Third, Agency § 8.14, comment b.
- 3 *Water Tower Realty Co. v. Fordham* 25 E. Superior, L.L.C., 404 Ill. App. 3d 658, 344 Ill. Dec. 370, 936 N.E.2d 1127 (1st Dist. 2010), appeal denied, 239 Ill. 2d 591, 348 Ill. Dec. 200, 943 N.E.2d 1110 (2011).
- 4 Restatement Third, Agency § 8.14, comment b.
- 5 Restatement Third, Agency § 8.14, comment b.
- 6 Restatement Third, Agency § 8.14, comment b.
As to the effect of termination of the agency on the agent's right to compensation, see § 240.
As to termination of the agency, generally, see §§ 31 to 63.
Jonklaas v. Silverman, 117 R.I. 691, 370 A.2d 1277 (1977).
- 7

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3 Am. Jur. 2d Agency § 230

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B. Duties and Liability of Principal to Agent

2. Reimbursement and Indemnification

§ 230. In connection with litigation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 77, 85

Forms

Forms relating to reimbursement and indemnification, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

In the absence of an express contractual provision that requires the principal to indemnify an agent in connection with litigation against the agent, a principal has a duty to indemnify the agent against expenses and other losses incurred by the agent in defending against actions brought by third parties if the agent acted with actual authority in taking the action challenged by the third party's suit.¹ Where the principal defends itself, the agent is not eligible for indemnification unless the principal's defense leaves the agent's interests unprotected.²

Indemnification is limited to a reimbursement for attorney's fees and expenses that are actually incurred and does not include other damages, such as damages for emotional distress or punitive damages.³

Observation:

Unproven allegations in the third party's complaint do not determine whether the agent is entitled to indemnification from the principal.⁴ A principal's duty to indemnify an agent for litigation costs is not like an insurer's duty to defend; the right to indemnification for litigation expenses should not depend on the pleading choices of a third party, who through an excess of caution or optimism may allege far more than he or she can prove at trial.⁵

If an agent gives timely notice of a third party's suit to the principal⁶ and the principal declines to provide the agent with a defense, the agent's right to indemnification should not thereafter turn on whether the agent litigated the suit to the bitter end, as opposed to settling it, so long as the agent acted reasonably and in good faith.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.14, comment d.
- 2 Meadowbrook-Richman, Inc. v. Associated Financial Corp., 325 F. Supp. 2d 341 (S.D. N.Y. 2004) (applying New York law).
- 3 General American Life Ins. Co. v. McCraw, 963 So. 2d 1111 (Miss. 2007).
- 4 Restatement Third, Agency § 8.14, comment d.
- 5 General American Life Ins. Co. v. McCraw, 963 So. 2d 1111 (Miss. 2007).
- 6 § 231.
- 7 Restatement Third, Agency § 8.14, comment d.

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3 Am. Jur. 2d Agency § 231

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2. Reimbursement and Indemnification

§ 231. In connection with litigation—Notice of third party's suit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 77, 85

Forms

Forms relating to reimbursement and indemnification, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An agent seeking indemnification has a prior duty to give timely notice to the principal of the third party's suit so that the principal may provide the agent with a defense. Providing the agent with a defense permits the principal to assume control of the defense of the litigation, which may be advantageous to the principal.¹

An agent's failure to give notice to the principal should not automatically bar the agent's right to indemnification, especially if the agent's defense was reasonable, and the principal did not suffer a loss as a consequence of losing its opportunity to control the defense of the suit. Moreover, the principal may have notice of the suit from sources other than the agent.²

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Footnotes

¹ [Restatement Third, Agency § 8.14](#), comment d.

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3 Am. Jur. 2d Agency § 232

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2. Reimbursement and Indemnification

§ 232. Unauthorized, tortious, or illegal acts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 77, 85

Forms

Forms relating to reimbursement and indemnification, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

A principal does not have a duty to indemnify an agent against losses caused by unauthorized action taken by the agent that did not benefit the principal or losses caused solely by wrongful acts committed by the agent.¹ Thus, a principal must indemnify a tort-committing agent when the agent acts in accordance with the principal's directions so long as the agent acted in good faith relying upon the lawfulness of the direction.²

Generally, an agent is not allowed, in the absence of an agreement to the contrary, to have indemnity for damages suffered by reason of his or her own negligence,³ fraud, misconduct,⁴ or other tort.⁵

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Footnotes

¹ [Restatement Third, Agency § 8.14](#), comment d.

- 2 Major Tours, Inc. v. Colorel, 799 F. Supp. 2d 376 (D.N.J. 2011) (applying New Jersey law).
- 3 Continental Ins. Co. of New York v. Sherman, 439 F.2d 1294, 15 Fed. R. Serv. 2d 930 (5th Cir. 1971); Shair-A-Plane v. Harrison, 291 Minn. 500, 189 N.W.2d 25 (1971).
- Evidence in an action involving contribution among liability insurers for a landlord and property manager supported conclusions that the negligence of the landlord's property manager in failing to prevent a child's fall from a shed was active and the manager would not be entitled to indemnity from the landlord where the manager had notice prior to the fall that children generally, and the injured child specifically, had been playing on the shed roof but failed to take immediate preventive action. [Edmondson Property Management v. Kwock](#), 156 Cal. App. 4th 197, 67 Cal. Rptr. 3d 243 (5th Dist. 2007).
- 4 In re Olsen, 358 B.R. 609 (Bankr. S.D. N.Y. 2007) (applying New York law); Guirney v. St. Paul, M. & M. Ry. Co., 43 Minn. 496, 46 N.W. 78 (1890).
- 5 American Auto. Ins. Co. v. Penn Mut. Indem. Co., 161 F.2d 62 (C.C.A. 3d Cir. 1947).

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3 Am. Jur. 2d Agency § 233

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3. Compensation

§ 233. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 81(1) to 81(4)

Forms

Forms relating to commissions and compensation, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides.¹ In order to determine what compensation is to be paid to an agent under the contract, the contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument.²

An agreement that an agent will not have a right to compensation for services provided may be implied from the agent's relationship to the principal or from the trivial nature of the services requested.³ Thus, it is not necessary for an agent to establish an express agreement that the agent should have pecuniary remuneration for services as the courts may infer such an agreement from the nature of the employment and the relations of the parties.⁴

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Footnotes

- 1 Restatement Third, Agency § 8.13, comment d.
As to the right to recover for services rendered in the absence of a contractual agreement for compensation,
see Am. Jur. 2d, Restitution and Implied Contracts §§ 33 to 44.
- 2 Monroe v. Grolier Soc. of London, 208 Cal. 447, 281 P. 604, 65 A.L.R. 989 (1929).
As to construction of compensation contracts, generally, see Am. Jur. 2d, Contracts §§ 487 to 499.
- 3 Restatement Third, Agency § 8.13, comment d.
- 4 Dellinger v. Van Hoorebeek, 64 So. 3d 836 (La. Ct. App. 4th Cir. 2011).
An agreement to compensate an agent or broker for services in the buying or selling of real estate need not
be in writing. Scheerer v. Fisher, 202 N.C. App. 99, 688 S.E.2d 472 (2010).

3 Am. Jur. 2d Agency § 234

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3. Compensation

§ 234. Amount

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 82, 83

Forms

Forms relating to commissions and compensation, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

The amount of compensation due may be determined by the terms of the agreement between the principal and agent and may be fixed in amount or made contingent on whether the agent achieves stated outcomes or on other criteria.¹ An agreement between a principal and an agent may also set the agent's right to compensation at an amount or rate that is standard or customary in a particular industry.²

If an agent has a right to be paid compensation by a principal but the amount due cannot be determined on the basis of the terms of the parties' agreement, the agent is entitled to the value of the services provided by the agent.³

In the absence of an agreement, the law implies a promise by the principal to pay what the services are reasonably worth.⁴ The agent is entitled to the fair and just value of his or her services, determined in the light of the surrounding circumstances and in the light of what others receive for like services⁵ in the community where performed.⁶

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Footnotes

- 1 Restatement Third, Agency § 8.13, comment d.
- 2 Restatement Third, Agency § 8.13, comment d.
- 3 Restatement Third, Agency § 8.13, comment d.
- 4 Stanton v. Embrey, 93 U.S. 548, 23 L. Ed. 983, 1876 WL 19673 (1876); Transcontinental Underwriters Agency, S. R. L. v. American Agency Underwriters, 680 F.2d 298 (3d Cir. 1982) (applying Pennsylvania law); Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 425 P.2d 282 (1967); Millar v. Cuddy, 43 Mich. 273, 5 N.W. 316 (1880).
As to the right to recover for services rendered in the absence of a contractual agreement for compensation, see Am. Jur. 2d, Restitution and Implied Contracts §§ 33 to 44.
- 5 Edmund J. Flynn Co. v. LaVay, 431 A.2d 543 (D.C. 1981); Powers & Co. v. American Soc. of Tool Engineers, 345 Mich. 392, 75 N.W.2d 824 (1956), opinion modified on other grounds on reh'g, 346 Mich. 697, 78 N.W.2d 632 (1956).
- 6 Morehouse v. Shepard, 183 Mich. 472, 150 N.W. 112 (1914); Kennon v. Commercial Standard Ins. Co., 52 Tenn. App. 521, 376 S.W.2d 703 (1963).

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3 Am. Jur. 2d Agency § 235

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

3. Compensation

§ 235. When agent is procuring cause of sale

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 81(5)

A.L.R. Library

Right of agent or broker, employed to sell personality on commission, to commissions on sales made or consummated by his principal or another agent, 12 A.L.R.2d 1360

Forms

Forms relating to commissions and compensation, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Unless there exists an exclusive agency,¹ an agent employed to sell the principal's goods or property is not entitled to commissions on sales of which such agent was not the procuring cause.² Unless the contract provides otherwise, any agent who is the originating or procuring cause of a sale is entitled to recover commissions thereon notwithstanding that the sale was

actually made or consummated by the principal personally or through another agent.³ This is so even though the transaction is consummated after termination of the agency upon which the commission is based.⁴

Unless the parties have agreed otherwise, a real estate broker has earned the promised commission when the broker produces a buyer who is ready, willing, and able to purchase at the terms set by the seller.⁵ Thus, a sales agent is not required to participate in all stages of a negotiation or to be present when an agreement finally is made, in order to be a procuring cause of the sale entitled to a commission, but merely introducing the contracting parties is not enough.⁶

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, agent was not "procuring cause" of sale of tactile warning tiles to buyer, as would allow him to collect commission on the sale pursuant to the procuring cause doctrine, since he sought to obtain commission payments for sales resulting from an ongoing relationship between the buyer and his principal that continued independently after agent's agreement had been reformed to allow for no commissions. [ADA Solutions, Inc. v. Meadors](#), 98 F. Supp. 3d 240 (D. Mass. 2015).

On his breach of contract claim against writer, literary agent was entitled to 11% commission on writer's contract for a five-book deal, despite fact that agent was terminated prior to that contract's execution, because he was the procuring cause of that contract; credible evidence demonstrated contract resulted from agent's efforts, as agent used a competing proposal from another publisher as leverage to obtain the basic agreement, agent was responsible for negotiating the $\frac{1}{3}$ advance, contract was nearly identical, down to its precise language, to another contract negotiated by agent before his termination, and that writer went to great lengths after agent's termination to cancel or stall the deal in explicit attempt to deprive him of his commission, as she switched one corporate entity through which she entered into deals for another entity and delayed execution for a few months. [Friedman v. Kuczir](#), 272 F. Supp. 3d 613 (S.D. N.Y. 2017).

Under provision of sales representative's contract with importer calling for representative to receive 50 percent of the profits from all sales that were a "result" of representative's "activities" when he brought "jobs, orders, and contacts" to the company, the duration of representative's commissions was the time profits arose as a direct result of representative's activities, but not when a returning customer made an order for products due to other factors such as customer satisfaction or product quality, regardless of any extrinsic evidence about the meaning of the contract terms. [Reilly v. Inquest Technology, Inc.](#), 218 Cal. App. 4th 536, 160 Cal. Rptr. 3d 236 (4th Dist. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 As to exclusive agency rights, see Am. Jur. 2d, *Brokers* §§ 303 to 305.
- 2 *Wood v. Hutchinson Coal Co.*, 176 F.2d 682, 12 A.L.R.2d 1352 (4th Cir. 1949); *Dolan v. Scanlan*, 57 Cal. 261, 1881 WL 1622 (1881); *Worster v. Stone*, 217 Mass. 523, 105 N.E. 383 (1914); *Kolb v. Bennett Land Co.*, 74 Miss. 567, 21 So. 233 (1897); *Sokol v. Liebstein*, 9 N.J. 93, 87 A.2d 1 (1952); *Koehler v. Honerkamp*, 93 Ohio App. 214, 50 Ohio Op. 505, 112 N.E.2d 685 (1st Dist. Hamilton County 1952); *Ely v. Wilde*, 62 Or. 111, 122 P. 1122 (1912); *Hoffman v. Lomma Enterprises, Inc.*, 208 Pa. Super. 296, 223 A.2d 234 (1966); *Dallas Electric Supply Co. v. Branum Co.*, 143 Tex. 366, 185 S.W.2d 427 (1945).
- 3 *Interstate Coal Co. v. Log Mountain Coal Co.*, 271 F. 76 (C.C.A. 6th Cir. 1921); *James A. Head & Co. v. Rolling*, 265 Ala. 328, 90 So. 2d 828 (1956); *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d

685 (1956); *Great Lakes Steel Corp. v. Baysoy*, 52 Del. 340, 157 A.2d 902 (1960); *Heuvelman v. Triplett Elec. Instrument Co.*, 23 Ill. App. 2d 231, 161 N.E.2d 875 (1st Dist. 1959) (disapproved of on other grounds by, *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 223 Ill. Dec. 911, 680 N.E.2d 1347 (1997)); *Jacobs v. A. Solomon*, 219 La. 237, 52 So. 2d 763 (1951); *Reed v. Kurdziel*, 352 Mich. 287, 89 N.W.2d 479 (1958); *Nichols v. Pendley*, 331 S.W.2d 673 (Mo. Ct. App. 1960); *Floyd v. Morristown European Motors, Inc.*, 138 N.J. Super. 588, 351 A.2d 791 (App. Div. 1976); *Binner v. George Ethridge Co.*, 241 N.Y. 598, 150 N.E. 570 (1925); *Minneapolis Steel & Machinery Co. v. Couch*, 1930 OK 241, 144 Okla. 259, 291 P. 74 (1929); *Hoffman v. Lomma Enterprises, Inc.*, 208 Pa. Super. 296, 223 A.2d 234 (1966).

Final consummation of the sale is not required for a sales agent to be entitled to a commission. *Leen v. Butter Co.*, 177 Wis. 2d 150, 501 N.W.2d 847 (Ct. App. 1993).

4 § 241.

5 Restatement Third, Agency § 8.13, comment c.

As to procuring cause in regard to brokers, see *Am. Jur. 2d, Brokers §§ 261 to 264*.

6 *Barton Group, Inc. v. NCR Corp.*, 796 F. Supp. 2d 473 (S.D. N.Y. 2011), judgment aff'd, 476 Fed. Appx. 275 (2d Cir. 2012) (applying New York law).

3 Am. Jur. 2d Agency § 236

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§ 236. Revocable offer to pay compensation to agent

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 81(1) to 81(4)

A.L.R. Library

Right of agent or broker, employed to sell personality on commission, to commissions on sales made or consummated by his principal or another agent, 12 A.L.R.2d 1360

Forms

Forms relating to sales agency agreement, generally, see Am. Jur. Legal Forms 2d, Agency [[Westlaw® Search Query](#)]

Forms relating to commissions and compensation, generally, see Am. Jur. Legal Forms 2d, Agency; Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An owner's revocable offer to pay compensation is a conventional structure used in brokerage and other intermediary arrangements that contemplate sales or other transactions and is typical of arrangements through which real estate is sold.¹

Whether an owner should be free to revoke the offer although the broker or other agent has made an effort toward effecting a transaction depends upon the nature of the agreement.² For example, the owner of residential property may use a nonexclusive or "open" listing, under which many brokers have the opportunity to attempt to sell the property, with the successful showing broker receiving a sales commission. In these instances, courts generally have not protected a broker's reliance on the seller's revocable offer.³ In contrast, when property is listed for sale on an exclusive basis with one broker, a court may protect a broker against revocation by the owner by interpreting the owner's offer as inviting a promise by the broker to use best efforts to effect a sale and inferring such a promise from the broker's commencement of performance and by treating the broker's commencement of performance as creating an option contract.⁴ The test applied in many cases is whether the broker's work should be characterized as the "procuring cause" of a transaction that follows revocation of the offer.⁵

Generally, a principal is required to provide a broker with an explanation for the principal's rejection of a prospective buyer. If a principal remains silent about a curable defect in a prospective buyer's offer, the principal's silence waives the principal's ability to use the defect as a defense against a subsequent claim by the broker to be paid the promised commission.⁶

Observation:

The principal does not, by contracting to pay compensation contingent upon the agent's success in accomplishing a definite result, thereby promise that he or she will not compete either personally or through another agent.⁷

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Footnotes

- 1 Restatement Third, Agency § 8.13, comment c.
As to compensation of brokers, generally, see Am. Jur. 2d, Brokers §§ 217 to 236.
- 2 Restatement Third, Agency § 8.13, comment c.
- 3 Restatement Third, Agency § 8.13, comment c.
- 4 Restatement Third, Agency § 8.13, comment c.
As to exclusive agency rights, see Am. Jur. 2d, Brokers §§ 303 to 305.
- 5 Restatement Third, Agency § 8.13, comment c.
As to procuring cause, generally, see § 235.
- 6 Restatement Third, Agency § 8.13, comment c.
- 7 King Powder Co. v. Dillon, 42 Colo. 316, 96 P. 439 (1908); Dixon v. Betten, 2 Ill. App. 3d 708, 277 N.E.2d 355 (5th Dist. 1971); Spatz v. Mile-Hi Realty, 589 P.2d 849 (Wyo. 1979).

3 Am. Jur. 2d Agency § 237

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§ 237. Effect of agent's fraud, misconduct, disobedience, or performance of illegal transactions

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 81(6), 84

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[Application of "Faithless Servant Doctrine"](#), 24 A.L.R.6th 399

[Effect of statement of real-estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor, so as to bar claim for commission](#), 17 A.L.R.2d 904

Trial Strategy

["Fraudulent or Dishonest Act" by Employee Covered by Fidelity Bond](#), 13 Am. Jur. Proof of Facts 3d 559

[Real Estate Broker's Negligence or Fraud in Not Disclosing Offer](#), 29 Am. Jur. Proof of Facts 263

Forms

Forms relating to misconduct of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

One who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally disentitled to recover compensation whether commissions or salary.¹ Thus, an agent may be denied compensation if he or she—

- takes a secret profit in the nature of a bonus, gratuity, or other personal benefit.²
- withholds information from the principal which it is the agent's duty to disclose.³
- discloses confidential matters to a third person.⁴
- willfully disregards an obligation owing to the principal, imposed by law by reason of the agency.⁵
- substantially varies from the terms of his or her authority, even where such variance was advantageous to the principal.⁶

Observation:

The disloyalty of an agent entitles its principal to avoid the agent's claims for damages arising from the principal's termination of the agency relationship, at least to the extent such claims involve future compensation.⁷

A principal who condones misconduct on the part of his or her agent may not rely on that misconduct to deprive the agent of compensation.⁸

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Footnotes

1 X-Med, Inc. v. Western New York Spine, Inc., 74 A.D.3d 1708, 903 N.Y.S.2d 215 (4th Dep't 2010).

2 British American & Eastern Co., Inc. v. Wirth Ltd., 592 F.2d 75 (2d Cir. 1979); Henderson v. Hassur, 225 Kan. 678, 594 P.2d 650 (1979); Raymond v. Davies, 293 Mass. 117, 199 N.E. 321, 102 A.L.R. 1112 (1936); G.K. Alan Assoc. Inc. v. Lazzari, 66 A.D.3d 830, 887 N.Y.S.2d 233 (2d Dep't 2009); Anderson Cotton Mills v. Royal Mfg. Co., 221 N.C. 500, 20 S.E.2d 818 (1942); Bute v. Stickney, 160 S.W.2d 302 (Tex. Civ. App. San Antonio 1942), writ refused w.o.m., (May 6, 1942).

As to an agent's duty not to take unfair advantage or secret profit in agency transactions, see § 204.

3 Wadsworth v. Adams, 138 U.S. 380, 11 S. Ct. 303, 34 L. Ed. 984 (1891).

As to an agent's duty to disclose information to the principal, generally, see § 222.

4 Haymes v. Rogers, 70 Ariz. 257, 219 P.2d 339, 17 A.L.R.2d 896 (1950), opinion modified on other grounds on reh'g, 70 Ariz. 408, 222 P.2d 789 (1950); Hight v. Marshall, 124 Ark. 512, 187 S.W. 433 (1916).

As to an agent's duty not to disclose confidential information, generally, see § 206.

- 5 Schepers v. Lautenschlager, 173 Neb. 107, 112 N.W.2d 767 (1962).
6 J. C. Peacock, Inc. v. Hasko, 196 Cal. App. 2d 353, 16 Cal. Rptr. 518, 88 A.L.R.2d 1430 (2d Dist. 1961).
7 As to an agent's duty to act within his or her actual authority, see § 217.
8 G.K. Alan Assoc. Inc. v. Lazzari, 66 A.D.3d 830, 887 N.Y.S.2d 233 (2d Dep't 2009).
 G.K. Alan Assoc. Inc. v. Lazzari, 66 A.D.3d 830, 887 N.Y.S.2d 233 (2d Dep't 2009).

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3 Am. Jur. 2d Agency § 238

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§ 238. Effect of agent's fraud, misconduct, disobedience, or performance of illegal transactions—Forfeiture of compensation

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[Application of "Faithless Servant Doctrine"](#), 24 A.L.R.6th 399

[Effect of statement of real-estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor, so as to bar claim for commission](#), 17 A.L.R.2d 904

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[Real Estate Broker's Negligence or Fraud in Not Disclosing Offer](#), 29 Am. Jur. Proof of Facts 263

Forms

Forms relating to misconduct of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to intentional or fraudulent misconduct of agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty.¹ Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach.²

In some jurisdictions, a "faithless servant" forfeits all compensation earned during the period of disloyalty even if the agent's services benefited the principal in some part.³ In other jurisdictions, the forfeiture may be partial if some benefit was conferred on the principal.⁴ In these jurisdictions, in determining whether an agent has breached a fiduciary duty to the principal and should forfeit the right to compensation, the trial court may consider the seriousness and timing of the violation, the willfulness of the breach, the potential for or actual harm to the principal, and whether the agent completed a divisible portion of the contract duties before the breach occurred for which compensation can be determined.⁵

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, faithless servant sanctions are not based on actual injury, but are imposed even absent injury. [In re Lee, 611 B.R. 303 \(Bankr. S.D. Ohio 2019\)](#).

Where an agent is guilty of concealment or nondisclosure of material facts relating to the subject matter of the agency, he forfeits his right to compensation, and it is not necessary that actual injury to the principal be shown. [Center for Healthcare Education and Research, Inc. v. International Congress for Joint Reconstruction, Inc., 57 Cal. App. 5th 1108, 272 Cal. Rptr. 3d 108 \(4th Dist. 2020\)](#), review filed, (Jan. 4, 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 Restatement Third, Agency § 8.01, comment d(2).
As to an employer's right to recover compensation paid by mistake or through an employee's fraud, see [Am. Jur. 2d, Employment Relationship](#) § 64.
- 2 Restatement Third, Agency § 8.01, comment d(2).
- 3 [Tyco Intern., Ltd. v. Kozlowski, 756 F. Supp. 2d 553 \(S.D. N.Y. 2010\)](#), certificate of appealability denied, 2011 WL 2038763 (S.D. N.Y. 2011) (applying New York law); [Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373 \(Mo. Ct. App. E.D. 2000\)](#).
- 4 [Rockefeller v. Grabow, 139 Idaho 538, 82 P.3d 450 \(2003\)](#) (a real estate developer was entitled to 87.5% of his development fee despite his breach of fiduciary duty to his clients where the subdivision was 85% to 90% complete when the developer first breached the fiduciary duty).
- 5 [Clinton Imperial China, Inc. v. Lippert Marketing, Ltd., 377 Ill. App. 3d 474, 316 Ill. Dec. 8, 878 N.E.2d 730 \(1st Dist. 2007\)](#).

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3 Am. Jur. 2d Agency § 239

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§ 239. Where agent acts for both parties

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 81(7)

Forms

Forms relating to misconduct of agent, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to agent acting for both parties, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

If it appears that an agent has attempted to act in behalf of both adverse parties to a transaction, without their knowledge of and consent to the dual agency, the agent will be denied a recovery from either of them.¹ An agent employed to negotiate a sale, purchase, or exchange of real² or personal³ property may not make a contract for compensation with the other party to the transaction. However, an agent of one of the parties to a sale or exchange of property may legally make a contract for compensation with the other party to the transaction with the knowledge or consent of the principal.⁴ Similarly, a contract under which each party to a transfer of property agrees to pay part of the agent's compensation is valid.⁵

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Footnotes

- 1 Wadsworth v. Adams, 138 U.S. 380, 11 S. Ct. 303, 34 L. Ed. 984 (1891); McMichael v. Burnett, 136 Kan. 654, 17 P.2d 932 (1933); Whittenberg v. Carnegie, 328 Mich. 125, 42 N.W.2d 900 (1950).
As to forfeiture of a commission as a remedy for a breach of the duty not to act for an adverse party, see § 212.
As to the compensation of a broker representing adverse interests, see Am. Jur. 2d, Brokers §§ 233 to 235.
- 2 Wadsworth v. Adams, 138 U.S. 380, 11 S. Ct. 303, 34 L. Ed. 984 (1891); L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp., 1 Cal. App. 4th 300, 1 Cal. Rptr. 2d 680 (4th Dist. 1991); Blake v. Stump, 73 Md. 160, 20 A. 788 (1890); Leathers v. Canfield, 117 Mich. 277, 75 N.W. 612 (1898); Howard v. Murphy, 70 N.J.L. 141, 56 A. 143 (N.J. Sup. Ct. 1903); Plotner v. Chillson & Chillson, 1908 OK 103, 21 Okla. 224, 95 P. 775 (1908); Whitney v. Bissell, 75 Or. 28, 146 P. 141 (1915); Leno v. Stewart, 89 Vt. 286, 95 A. 539 (1915); Reed v. Johnson, 27 Wash. 42, 67 P. 381 (1901).
- 3 Burton v. Pet, Inc., 509 S.W.2d 95 (Mo. 1974); Atlee v. Fink, 75 Mo. 100, 1881 WL 9902 (1881).
- 4 Homefinders v. Lawrence, 80 Idaho 543, 335 P.2d 893 (1959); Cannell v. Smith, 142 Pa. 25, 21 A. 793 (1891); Barry v. Schmidt, 57 Wis. 172, 15 N.W. 24 (1883).
- 5 As to the right to act as a dual agent with the knowledge and consent of the principals, see § 211.
Rowe v. Stevens, 53 N.Y. 621, 1873 WL 10420 (1873).

3 Am. Jur. 2d Agency § 240

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§ 240. Effect of termination of agency

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Forms

Forms relating to termination of agency, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to compensation of attorney-in-fact, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to compensation, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to denial that commission is due, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

The contract between the parties governs when the commissions are earned and therefore whether they are to be paid even after the expiration or termination of the contract.¹ Thus, if a sales representative is found to have a contractual obligation requiring the completion of continuing duties prior to the earning of a commission, the termination of the commission agreement prior to the completion of such duties terminates the right to earn commissions, and no commissions would be due after the relationship has ended; however, if the triggering event for the earning of commissions has occurred prior to termination, the commissions are payable after termination.²

Where the principal terminates or repudiates the agent's employment in violation of the contract of employment and without cause, or where the agent properly terminates because of the principal's breach, the agent is entitled to prospective profits he or she would have made except for such wrongful termination, providing that such profits are not conjectural or

speculative.³ Although the general rule that the principal cannot avoid paying commissions by merely terminating the agency after the agent accomplishes the result for which he or she was retained does not apply when the agency agreement specifically limits the recovery of commissions following termination, the termination must not be in bad faith, that is, it must not be done in order to avoid paying what would otherwise be due.⁴

An agent whose appointment is terminated without fault is entitled to the fair value of his or her services.⁵ Thus, sales agents are entitled to posttermination commissions for sales they procured during their time at the former employer.⁶ Where an agent is discharged prior to the culmination of a sale but after the agent has completed everything necessary to procure the sale, it is the agent's burden to show that the agent's efforts procured the sale.⁷

In the absence of an express provision to such effect, a sales agent is not entitled to commissions on renewal sales made after termination of his or her employment.⁸

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Footnotes

¹ *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 2006 FED App. 0177P (6th Cir. 2006) (applying Ohio law); *Compagnia Importazioni Esportazioni Rappresentanze v. L-3 Communications Corp.*, 703 F. Supp. 2d 296 (S.D. N.Y. 2010) (applying New York law); *Clinton Imperial China, Inc. v. Lippert Marketing, Ltd.*, 377 Ill. App. 3d 474, 316 Ill. Dec. 8, 878 N.E.2d 730 (1st Dist. 2007).

² *Compagnia Importazioni Esportazioni Rappresentanze v. L-3 Communications Corp.*, 703 F. Supp. 2d 296 (S.D. N.Y. 2010) (applying New York law).

³ *Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N.W. 228 (1908); *Bak-A-Lum Corp. of America v. Alcoa Bldg. Products, Inc.*, 69 N.J. 123, 351 A.2d 349 (1976); *Macan v. Scandinavia Belting Co.*, 264 Pa. 384, 107 A. 750, 5 A.L.R. 1502 (1919).

An author's contract with a literary agent did not entitle the agent to recover commissions on all future agreements or extensions where the contract did not provide for such compensation, and the author's new agent, not the former agent, was the procuring cause of the future contract and extensions. *Peter Lampack Agency, Inc. v. Grimes*, 93 A.D.3d 430, 939 N.Y.S.2d 409 (1st Dep't 2012).

As to the duration and termination of agency contracts, see §§ 31 to 63.

As to the right of employees, generally, to compensation after termination of employment, see *Am. Jur. 2d, Employment Relationship* §§ 67 to 75.

⁴ *Phillips v. U.S. Bank, N.A.*, 2010 WI App 35, 324 Wis. 2d 151, 781 N.W.2d 540 (Ct. App. 2010), aff'd by an equally divided court, 2010 WI 131, 329 Wis. 2d 639, 791 N.W.2d 190 (2010).

The procuring-cause doctrine did not apply to allow an independent sales agent to recover commissions on sales to a client he initially generated orders from where the client, and not the manufacturer that the agent represented, refused to deal with him, and his termination by the manufacturer was done not to deprive him of his commissions but to retain the client. *KBD & Associates, Inc. v. Great Lakes Foam Technologies, Inc.*, 295 Mich. App. 666, 816 N.W.2d 464 (2012).

⁵ *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543 (D.C. 1981).

⁶ *KBD & Associates, Inc. v. Great Lakes Foam Technologies, Inc.*, 295 Mich. App. 666, 816 N.W.2d 464 (2012).

As to commissions based upon a sales agent being the procuring cause of the sale, see § 235.

⁷ *Restatement Third, Agency* § 8.13, comment c.

⁸ *Chesapeake & Potomac Telephone Co. of Baltimore City v. Murray*, 198 Md. 526, 84 A.2d 870, 28 A.L.R.2d 920 (1951).

A former sales agent was not entitled to commissions from an employer for renewals of service agreements he had originally obtained following his termination, under terms of a written marketing referral agreement, as the agreement stated that the employer agreed to pay the former agent a commission on service agreements

signed "during the term of this agreement," but the renewals at issue were signed after the former agent was terminated, and thus, they were not signed "during the term of this agreement." [Carter v. PeopleAnswers, Inc.](#), 312 S.W.3d 308 (Tex. App. Dallas 2010).

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3 Am. Jur. 2d Agency § 241

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§ 241. Effect of termination of agency—Termination for cause

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Forms

Forms relating to termination of agency, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to compensation of attorney-in-fact, generally, see Am. Jur. Legal Forms 2d, Agency [\[Westlaw® Search Query\]](#)

Forms relating to compensation, generally, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

Forms relating to denial that commission is due, see Am. Jur. Pleading and Practice Forms, Agency [\[Westlaw® Search Query\]](#)

A sales agent who commits the first substantial breach of a commissions contract is not entitled to recover posttermination commissions,¹ and any losses the agent causes may be offset against any claim the agent may have for compensation.²

Where a principal properly discharges an agent for breach of contract, or the agent wrongfully renounces the employment, the principal must pay to the agent, with a deduction for the loss caused the principal by the breach of contract, the agreed compensation for services properly rendered for which the compensation is apportioned in the contract, whether or not the agent's breach is willful and deliberate, and the value, not exceeding the agreed ratable compensation, of services properly rendered for which the compensation is not apportioned if, but only if, the agent's breach is not willful and deliberate.³

Footnotes

- 1 KBD & Associates, Inc. v. Great Lakes Foam Technologies, Inc., 295 Mich. App. 666, 816 N.W.2d 464 (2012).
As to the effect of an agent's fraud, misconduct, or disobedience on the right to compensation, see § 237.
- 2 Hartford Elevator, Inc. v. Lauer, 94 Wis. 2d 571, 289 N.W.2d 280 (1980).
- 3 Baldwin v. Prince, 265 Ark. 384, 578 S.W.2d 240 (1979).

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3 Am. Jur. 2d Agency § 242

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X. Rights, Duties, and Liabilities Between Principal and Agent

B. Duties and Liability of Principal to Agent

3. Compensation

§ 242. Liability for advances in excess of agent's earnings

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 85

A.L.R. Library

Personal liability of servant or agent for advances or withdrawals in excess of commissions earned, bonus, or share of profits,
32 A.L.R.3d 802

Forms

Forms relating to recovering money received from principal, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

Whether money given by a principal is given as an advance and is to be repaid by the agent in the event that the agent's commission or other compensation does not amount to the sum advanced depends on the interpretation of the contract between them.¹ While the parties may provide in their agreement for personal liability for advances in excess of the agent's earnings, in the absence of language, or at least some evidence indicative of such an intention, it will generally be presumed that no liability was intended.²

Where a principal does not give an agent sufficient opportunity to recoup costs incurred in good faith in serving the principal, the principal is required to compensate the agent for such costs unless there is a specific agreement to the contrary.³

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Footnotes

- 1 Beneficial Life Ins. Co. v. Knobelauch, 653 F.2d 393 (9th Cir. 1981) (applying California law); Matter of Hallmark Builders, Inc., 57 B.R. 121 (Bankr. M.D. Fla. 1986) (implied contract); Insurance Management of Washington, Inc. v. Guthrie, 310 A.2d 61 (D.C. 1973); Crosby v. East West, Inc., 278 Ga. App. 329, 629 S.E.2d 41 (2006); Skweres v. Diamond Craft Co., 512 N.E.2d 217 (Ind. Ct. App. 1987) (oral contract); Fletcher, Barnhardt & White, Inc. v. Matthews, 100 N.C. App. 436, 397 S.E.2d 81 (1990) (finding no express or implied contract relating to the issue).
A publisher's agreement "to waive [a sales representative's] cost of product implementation, pilots, samples, and shipping from 2007. Any balances owed by [the sales representative] to [the publisher] from 2007 will be netted to zero" required the publisher to waive costs from 2007 that remained outstanding as of the date the parties entered into the agreement but did not require the publisher to refund the amount it had earlier charged the representative against his commission in 2007. *Kelly v. McGraw-Hill Companies, Inc.*, 865 F. Supp. 2d 912 (N.D. Ill. 2012).
As to the rights and liabilities of employers and employees for agreed advances which exceed commissions or profits, see *Am. Jur. 2d, Employment Relationship* § 58.
- 2 Valoco Bldg. Products, Inc. v. Chafee, 4 Conn. Cir. Ct. 322, 231 A.2d 101 (1966); Crosby v. East West, Inc., 278 Ga. App. 329, 629 S.E.2d 41 (2006); Perma-Home Corp. v. Nigro, 346 Mass. 349, 191 N.E.2d 745 (1963).
- 3 Di Gennaro v. Rubbermaid, Inc., 214 F. Supp. 2d 1354 (S.D. Fla. 2002) (applying Florida law).

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3 Am. Jur. 2d Agency § 243

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 243. Generally; authorized acts or transactions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 92(1), 93 to 96, 99, 101(1)

A.L.R. Library

Vicarious or Imputed Liability for Intentional Infliction of Emotional Distress—Nonemployee Plaintiffs, 8 A.L.R.6th 399
When is national union responsible for the acts of a local union under Taft-Hartley Act provision making it unfair labor practice for union to restrain or coerce employees, 100 A.L.R.2d 362

Trial Strategy

Employer's Liability for Employee's Intentional Wrong Committed at Customer's Home or Business, 37 Am. Jur. Proof of Facts 3d 191
Emotional Distress by Schoolteacher or Administrator, 18 Am. Jur. Proof of Facts 3d 103
Vicarious Liability under Doctrine of Ostensible or Apparent Agency, 6 Am. Jur. Proof of Facts 3d 457
Insurer's Liability for Emotional Distress, 32 Am. Jur. Proof of Facts 2d 99

Forms

Forms relating to notice of authority, generally, see Am. Jur. Legal Forms 2d, Agency [[Westlaw® Search Query](#)]

Forms relating to liability of principal on contracts executed by agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to principal being answerable for the acts of the agent, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to wrongs to third persons inflicted by employees, see Am. Jur. Pleading and Practice Forms, Master and Servant [[Westlaw® Search Query](#)]

A principal is bound by the act of its agent if the agent acts within the scope of the agent's authority,¹ whether the authority of the agent is actual² or real³ or apparent.⁴

Observation:

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.⁵

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal, and that belief is traceable to the principal's manifestations.⁶

A party is responsible for any action or inaction by the party or the party's agent.⁷ Thus, for example, a representation made by an authorized agent of the principal is binding upon the principal.⁸ Also, an agent acting with actual or apparent authority who enters a contract on behalf of a principal binds the principal but not him- or herself.⁹

Practice Tip:

A principal is derivatively responsible for an agent's acts unless the agent's responsibility has been discharged on the merits and not based on a personal defense.¹⁰ Moreover, if there is an independent basis for finding the principal liable, then judgment can be entered against the principal even if judgment is entered in favor of the agent.¹¹

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Footnotes

- 1 Azarchi-Steinhauser v. Protective Life Ins. Co., 629 F. Supp. 2d 495 (E.D. Pa. 2009) (applying Pennsylvania law); Santa Fuel, Inc. v. Varga, 77 Conn. App. 474, 823 A.2d 1249 (2003); Eads v. Borman, 351 Or. 729, 277 P.3d 503 (2012).
Ordinarily, principals are vicariously liable for the acts of their agents in the scope of their authority or employment. Meyer v. Holley, 537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003).
- 2 Azarchi-Steinhauser v. Protective Life Ins. Co., 629 F. Supp. 2d 495 (E.D. Pa. 2009) (applying Pennsylvania law); Santa Fuel, Inc. v. Varga, 77 Conn. App. 474, 823 A.2d 1249 (2003); Eads v. Borman, 351 Or. 729, 277 P.3d 503 (2012).
- 3 Booker ex rel. Certain Underwriters at Lloyd's of London v. Pettey, 770 So. 2d 39 (Miss. 2000).
- 4 Santa Fuel, Inc. v. Varga, 77 Conn. App. 474, 823 A.2d 1249 (2003); Eads v. Borman, 351 Or. 729, 277 P.3d 503 (2012).
- 5 Restatement Third, Agency § 2.01.
- 6 Restatement Third, Agency § 2.03.
- 7 Alken-Ziegler, Inc. v. Waterbury Headers Corp., 461 Mich. 219, 600 N.W.2d 638 (1999).
- 8 § 252.
- 9 Lee v. YES of Russellville, Inc., 784 So. 2d 1022 (Ala. 2000).
- 10 Bank of America NT & SA v. Hubert, 153 Wash. 2d 102, 101 P.3d 409, 55 U.C.C. Rep. Serv. 2d 297 (2004).
- 11 Greco v. University of Delaware, 619 A.2d 900, 80 Ed. Law Rep. 899 (Del. 1993).

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3 Am. Jur. 2d Agency § 244

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 244. Unauthorized acts or transactions, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 96, 99, 147(.5), 149(1), 149(3), 150(1), 150(2), 159(.5) to 160

Trial Strategy

[Vicarious Liability under Doctrine of Ostensible or Apparent Agency](#), 6 Am. Jur. Proof of Facts 3d 457

Forms

Forms relating to apparent authority and agents not authorized, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

No person is liable for the acts of another who assumes to represent him or her unless such person has expressly or impliedly made such other his or her representative.¹ Nor, unless there is a later ratification by the principal,² can a person dealing with an agent hold the principal liable for any act or transaction of the agent not within the scope of his or her actual or apparent authority,³ and the lack of authority is known to such person.⁴ Moreover, without the acts of the purported principal, the acts of a purported agent which may mislead persons into false inferences of authority, however reasonable, will not serve as a predicate

for apparent authority.⁵ As a matter of fact, for all such unauthorized acts the agent may be held personally liable.⁶ Conversely, however, the principal is bound by unauthorized acts of an agent through which an innocent third party has sustained a loss unless the limitations of the agency are known or can be readily ascertained.⁷ Furthermore, even though there is no ratification, a person on whose account another acts or purports to act may become a party to a transaction similar to the original transaction by manifesting consent or may become subject to liability for the value of benefits received as a result of the original transaction.⁸

Where a principal timely repudiates an agreement entered by an otherwise unauthorized agent, the agreement is not ratified,⁹ and after the third person has notice of the principal's repudiation of the agent's authority to do a particular act, the principal will no longer be liable for such act.¹⁰ Conversely, if the principal benefits from the agent's unauthorized act, ratification may be implied pretty quickly from the lapse of time in which the principal fails to repudiate the agent's act.¹¹

The act of an agent after the termination of an agency for a particular purpose and notice of the revocation of the agency will not ordinarily bind the principal.¹²

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Footnotes

- 1 Hatton v. Quad Realty Corp., 100 A.D.2d 609, 473 N.Y.S.2d 827 (2d Dep't 1984).
- 2 § 186.
- 3 A. B. Leach & Co. v. Peirson, 275 U.S. 120, 48 S. Ct. 57, 72 L. Ed. 194, 55 A.L.R. 457 (1927); Abbott Laboratories v. McLaren General Hosp., 919 F.2d 49 (6th Cir. 1990); Northern Assur. Co. of America v. Summers, 17 F.3d 956 (7th Cir. 1994); Schmidt v. Farm Credit Services, 977 F.2d 511 (10th Cir. 1992) (applying Kansas law).
- 4 Modern Globe, Inc. v. 1425 Lake Drive Corporation, 340 Mich. 663, 66 N.W.2d 92 (1954); Ellis v. Nelson, 68 Nev. 410, 233 P.2d 1072 (1951).
The "doctrine of apparent authority" is unavailable to one who knows an agent lacks actual authority. Northlake Development L.L.C. v. BankPlus, 60 So. 3d 792 (Miss. 2011).
- 5 Kahn v. Imperial Airport, L.P., 308 S.W.3d 432 (Tex. App. Dallas 2010).
- 6 Kennett v. Marquis, 798 A.2d 416 (R.I. 2002).
An unauthorized agent purporting to enter into a contract for a principal is personally liable. Carollo v. Irwin, 2011 IL App (1st) 102765, 355 Ill. Dec. 49, 959 N.E.2d 77 (App. Ct. 1st Dist. 2011).
As to an agent's liability to a third person for unauthorized contracts, see §§ 274, 275.
- 7 Richards v. General Motors Corp., 991 F.2d 1227 (6th Cir. 1993); Lange v. Curtin, 11 Cal. App. 2d 161, 53 P.2d 185 (1st Dist. 1936); Farmer's Union Oil Co. of Dickinson v. Wood, 301 N.W.2d 129 (N.D. 1980).
The principal is liable for acts of its agent committed in the scope of the agent's employment even though the principal did not authorize the act. U.S. v. Daddona, 34 F.3d 163 (3d Cir. 1994), as amended, (Sept. 29, 1994) (applying Pennsylvania law).
- 8 U.S. v. Mead, 426 F.2d 118 (9th Cir. 1970); Newport Oil Corp. v. Viti Bros., Inc., 454 A.2d 706 (R.I. 1983).
- 9 Airline Support, Inc. v. ASM Capital II, L.P., 279 P.3d 599 (Alaska 2012).
- 10 Johns v. Jaycox, 67 Wash. 403, 121 P. 854 (1912).
- 11 Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 883 N.E.2d 1235 (2008).
- 12 Smith v. Joyce, 214 N.C. 602, 200 S.E. 431 (1939).

3 Am. Jur. 2d Agency § 245

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 245. Tort liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 158, 159(.5), 159(1)

A.L.R. Library

[Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer, 13 A.L.R.5th 217](#)

Trial Strategy

[Liability of Creditor and Repossession Agent for Wrongful Repossession and Tortious Acts Committed During Repossession, 42 Am. Jur. Proof of Facts 3d 355](#)

[Employer's Liability for Employee's Intentional Wrong Committed at Customer's Home or Business, 37 Am. Jur. Proof of Facts 3d 191](#)

Forms

Forms relating to tort liability of principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

A negligence finding against an individual does not automatically result in individual liability when the individual was acting as the agent or employee of a corporation.¹ Accordingly, a principal may be liable for the tortious acts of an agent which are done within the scope of the agent's employment.² However, a principal is not liable for the torts committed by an agent while acting adversely to the principal³ or outside the scope of the agent's employment⁴ unless the principal commands or directs the act.⁵ Similarly, one principal is not civilly liable to another for the tortious acts of an agent who acts for both parties with their consent unless the principal participates in the wrong.⁶

A principal may be held liable for an agent's tort committed in the course and scope of the agent's employment even though the principal does not authorize, ratify, participate in, or know of such misconduct or even if the principal forbade or disapproved of the act complained of.⁷ Moreover, the acts of an agent with inherent authority will bind the principal where the acts done are those which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them, and the other party has no notice that he or she is not so authorized.⁸

Observation:

An agent is primarily liable for wrongdoing by the agent, and the employer is secondarily liable; consequently, if the employee-agent is found not to be liable, there is no claim against the employer based on the employee's actions.⁹

CUMULATIVE SUPPLEMENT

Cases:

Under Florida law, there is no liability where the agent has stepped aside from his employment to commit a tort which the principal neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the agent to do; in other words, the master's liability does not arise when the wrongful act is committed by the agent to accomplish his own purpose and not to serve the interests of the principal. *Chestnut Associates, Inc. v. Assurance Co. of America*, 2014 WL 1711579 (M.D. Fla. 2014).

Under Pennsylvania law, for a corporate agent to be personally liable for his own torts, under participation theory, agent must have participated in the wrongful acts; theory permits liability for an agent's misfeasance, but not for mere nonfeasance. *Hricik v. Stryker Biotech, LLC*, 89 F. Supp. 3d 694 (E.D. Pa. 2015).

For a principal to be held vicariously liable for the acts of an agent, Delaware law requires that a tort be committed by the servant within the scope of his employment and not be unexpectable in view of the duties of the servant. [In re Minardi](#), 536 B.R. 171 (Bankr. E.D. Tex. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Tri v. J.T.T.](#), 162 S.W.3d 552 (Tex. 2005).
- 2 [Gleason v. Seaboard Air Line Ry. Co.](#), 278 U.S. 349, 49 S. Ct. 161, 73 L. Ed. 415 (1929); [In re Evans](#), 460 B.R. 848 (Bankr. S.D. Miss. 2011) (applying Mississippi law); [Tercero v. Roman Catholic Diocese of Norwich](#), Connecticut, 2002-NMSC-018, 132 N.M. 312, 48 P.3d 50 (2002); [Revels v. Miss America Organization](#), 182 N.C. App. 334, 641 S.E.2d 721 (2007).
- 3 [Wolfson Car Leasing Co., Inc. v. Weberg](#), 200 Neb. 420, 264 N.W.2d 178 (1978).
- 4 [Ex parte Wild Wild West Social Club, Inc.](#), 806 So. 2d 1235 (Ala. 2001).
The liability of an agent may be entirely independent of his principal's liability; for example, the agent may have acted outside the scope of his employment. [Cameron Hospitality, Inc. v. Cline Design Associates, PA](#), 735 S.E.2d 348 (N.C. Ct. App. 2012), review denied, 738 S.E.2d 370 (N.C. 2013).
- 5 [White v. Revco Discount Drug Centers, Inc.](#), 33 S.W.3d 713 (Tenn. 2000).
- 6 [Hodges v. Mayes](#), 240 Ga. 643, 242 S.E.2d 160 (1978); [Boss v. Tomaras](#), 251 Mich. 469, 232 N.W. 229 (1930).
- 7 [Stockwell v. U.S.](#), 80 U.S. 531, 20 L. Ed. 491, 1871 WL 14778 (1871); [Forcine Concrete & Const. Co., Inc. v. Manning Equipment Sales & Service](#), 426 B.R. 520 (E.D. Pa. 2010); [Pressley v. Travelers Property Cas. Corp.](#), 2003 PA Super 58, 817 A.2d 1131 (2003); [Spence v. Spence](#), 368 S.C. 106, 628 S.E.2d 869 (2006).
- 8 [Quality Foods, Inc. v. Holloway Associates Professional Engineers and Land Surveyors, Inc.](#), 852 N.E.2d 27 (Ind. Ct. App. 2006).
- 9 [Edwards v. Ohio Inst. of Cardiac Care](#), 170 Ohio App. 3d 619, 2007-Ohio-1333, 868 N.E.2d 721 (2d Dist. Greene County 2007).

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3 Am. Jur. 2d Agency § 246

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 246. Tort liability—Restatement

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 158, 159(.5), 159(1)

According to the Restatement Third of Agency, a principal is subject to direct liability to a third party harmed by an agent's conduct when any of the following situations occur:¹

- the agent acts with actual authority or the principal ratifies the agent's conduct and the agent's conduct is tortious, or the agent's conduct, if that of the principal, would subject the principal to tort liability²
- the principal is negligent in selecting, supervising, or otherwise controlling the agent³
- the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty⁴

A principal is subject to vicarious liability to a third party harmed by an agent's conduct when either of the following situations occur:⁵

- the agent is an employee who commits a tort while acting within the scope of employment⁶
- the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal⁷

When a principal has a special relationship with another person, the principal owes that person a duty of reasonable care with regard to risks arising out of the relationship, including the risk that agents of the principal will harm the person with whom the principal has such a special relationship.⁸

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Footnotes

- 1 Restatement Third, Agency § 7.03(1).
- 2 As stated in Restatement Third, Agency § 7.04.
- 3 As stated in Restatement Third, Agency § 7.05(1).
- 4 As stated in Restatement Third, Agency § 7.06.
- 5 Restatement Third, Agency § 7.03(2).
- 6 As stated in Restatement Third, Agency § 7.07.
- 7 As stated in Restatement Third, Agency § 7.08.
- 8 Restatement Third, Agency § 7.05(2).

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3 Am. Jur. 2d Agency § 247

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 247. Contracts unauthorized in part

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 147(.5), 155(.5) to 155(4)

Whether a contract exceeding the agent's authority may be enforced against the principal to the extent to which it was authorized depends upon the divisibility of the contract.¹ A principal is not relieved from the separable part of a contract which he or she authorized the agent to make by the fact that the agent undertook, in excess of his or her authority, to bind the principal to another part of the agreement.² The partial validity rule is applicable even where the agent's unauthorized act constitutes a fraud on both the principal and the third person.³

Under the Restatement Third of Agency, if an agent makes a contract with a third party that differs from the contract that the agent had actual or apparent authority to make only in an amount or by the inclusion or exclusion of a separable part, the principal is subject to liability to the third party to the extent of the contract that the agent had actual or apparent authority to make if the third party reasonably makes a manifestation to the principal of willingness to be bound, and the principal has not changed position in reasonable reliance on the belief that no contract bound the principal and the third party.⁴

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Footnotes

¹ [Spengler v. Sonnenberg](#), 88 Ohio St. 192, 102 N.E. 737 (1913).

² [Lachmiller v. Lachmiller Engineering Co.](#), 144 Cal. App. 2d 533, 301 P.2d 288 (2d Dist. 1956); [Spengler v. Sonnenberg](#), 88 Ohio St. 192, 102 N.E. 737 (1913); [Walker v. Peake](#), 153 S.C. 257, 150 S.E. 756 (1929).

³ [DeBoer Const., Inc. v. Reliance Ins. Co.](#), 540 F.2d 486 (10th Cir. 1976).

⁴ Restatement Third, Agency § 6.05(1).

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 248. Usurious contracts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 147(.5), 155(.5) to 155(4)

A principal is not liable for a usurious agreement of an agent which is entered into without the principal's knowledge or consent and under circumstances which do not impute knowledge thereof.¹ On the other hand, where the principal expressly or impliedly authorizes or ratifies the agent's usurious agreement, or where the circumstances are such that the agent's conduct is presumed to be known to the principal, the principal is bound.² Where the issue is whether the agent had apparent authority to enter into a usurious agreement, whether the principal is bound by the agent's acts requires a case-by-case inquiry into whether the principal's conduct reasonably induced a third party to believe that the agent had authority to act for the principal.³ According to some courts, the principal of an agent entrusted with the full care and control of the principal's property and empowered to make loans is presumed to know the character of the agent's transactions and is therefore liable for a usurious contract entered into by the agent.⁴

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Footnotes

- 1 Brown v. Johnson, 43 Utah 1, 134 P. 590 (1913); Haymond v. First Nat. Bank, 115 W. Va. 345, 176 S.E. 239 (1934).
- 2 Robinson v. Sims, 85 Minn. 242, 88 N.W. 845 (1902); Haymond v. First Nat. Bank, 115 W. Va. 345, 176 S.E. 239 (1934).
- 3 Hollingsworth v. American Finance Corp., 86 Wis. 2d 172, 271 N.W.2d 872 (1978).
- 4 Clarke v. Havard, 111 Ga. 242, 36 S.E. 837 (1900); France v. Munro, 138 Iowa 1, 115 N.W. 577 (1908).

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3 Am. Jur. 2d Agency § 249

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 249. Acts in violation of instructions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 147(.5), 159(.5) to 160

If an act done by an agent is within the apparent scope of the authority with which the agent has been clothed, it does not matter that it is directly contrary to the instructions of the principal, and the principal will be liable unless the third person with whom the agent dealt knew that the agent was exceeding his or her authority or violating his or her instructions.¹ Thus, an innocent principal is liable for the torts committed by an agent while acting within the scope of the agency even if the agent acts contrary to instructions.² Furthermore, if one appoints an agent to conduct a series of transactions over a period of time, it is fair that such person should bear losses which are incurred when an agent, although without authority to do so, does something which is usually done in connection with the transactions he or she is empowered to conduct.³

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Footnotes

- 1 Hartmann v. Prudential Ins. Co. of America, 9 F.3d 1207 (7th Cir. 1993); Wal-Mart Stores, Inc. v. Crist, 855 F.2d 1326 (8th Cir. 1988) (applying Arkansas law); Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind. 1998).
- 2 Stokes v. California Horse Racing Bd., 98 Cal. App. 4th 477, 119 Cal. Rptr. 2d 792 (2d Dist. 2002), as modified, (June 12, 2002).
- 3 Holloway v. Howerdd, 536 F.2d 690 (6th Cir. 1976).

3 Am. Jur. 2d Agency § 250

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 250. Adverse acts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 147(.5), 157, 177(1), 180

According to some courts, an agent's knowledge and dealings with another party are generally imputed to the principal but not if the agent's interests are adverse to those of the principal¹ and are entirely for his or her own or another's purpose.²

Practice Tip:

The principal bears the burden of showing that the agent has totally abandoned the principal's interest and is acting for his or her own purposes or those of another.³

Similarly, the "dual agency doctrine" provides that when an agent without the knowledge and consent of his or her principal represents an adverse party in a transaction, his or her contracts relating thereto are voidable at the option of the principal.⁴

According to other courts, however, the rule that a principal is liable for the contracts of an agent applies even though the agent, in contracting, acts in his or her own interests and adversely to the principal where the party with whom the agent contracts has no knowledge of the agent's dereliction and is not cognizant of any fact that should give rise to such knowledge.⁵ The principal, having selected the representative and vested him or her with apparent authority, should be the loser in such case and not the

innocent party who relied thereon.⁶ However, an agent cannot bind the principal where the person with whom the agent contracts knows⁷ or should know⁸ that the agent is engaged in self-dealing or has an adverse interest.

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Footnotes

- 1 National Production Workers Union Ins. Trust v. Cigna Corp., 665 F.3d 897 (7th Cir. 2011) (applying Illinois law); Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008); McRaith v. BDO Seidman, LLP, 391 Ill. App. 3d 565, 330 Ill. Dec. 597, 909 N.E.2d 310 (1st Dist. 2009).
- 2 In re National Century Financial Enterprises, Inc., 783 F. Supp. 2d 1003 (S.D. Ohio 2011) (applying Ohio law).
- 3 Tobacco Technology, Inc. v. Taiga Intern. N.V., 388 Fed. Appx. 362 (4th Cir. 2010) (applying Maryland law).
- 4 Hidden Brook Air, Inc. v. Thabet Aviation Intern. Inc., 241 F. Supp. 2d 246 (S.D. N.Y. 2002) (applying New York law).
- 5 Jones v. Federated Financial Reserve Corp., 144 F.3d 961, 1998 FED App. 0157P (6th Cir. 1998); Speed v. Muhanna, 274 Ga. App. 899, 619 S.E.2d 324 (2005); Hollingsworth v. American Finance Corp., 86 Wis. 2d 172, 271 N.W.2d 872 (1978).
- 6 Speed v. Muhanna, 274 Ga. App. 899, 619 S.E.2d 324 (2005).
- 7 Hidden Brook Air, Inc. v. Thabet Aviation Intern. Inc., 241 F. Supp. 2d 246 (S.D. N.Y. 2002) (applying New York law).
- 8 Langlois v. Gragnon, 123 La. 453, 49 So. 18 (1909).

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3 Am. Jur. 2d Agency § 251

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 251. Effect of agent's forgery, alteration, or completion of instrument

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 109(4), 158, 159(.5), 159(1), 164(2)

A.L.R. Library

[Discharge of debtor who makes payment by delivering check payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 A.L.R.3d 843](#)

Generally, a principal will not be liable for the agent's forgeries or unauthorized alterations or completions of instruments.¹ Furthermore, if an agent who is authorized to receive a check payable to the principal as conditional payment forges the principal's endorsement to such a check, the maker is relieved of liability to the principal if the drawee bank pays the check and charges the amount to the maker² although there is also some authority to the contrary.³ Moreover, according to some courts, an otherwise authorized signature on a negotiable instrument is not converted into an unauthorized forgery when an agent, authorized to sign negotiable instruments in his or her principal's name, abuses that authority by negotiating the instrument to a holder in due course for the agent's own personal benefit.⁴ In any case, a principal may ratify the forgery of his or her signature by an agent.⁵

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Footnotes

- 1 Brooks v. Gray-Von Allmen Sanitary Milk Co., 211 Ky. 462, 277 S.W. 816, 46 A.L.R. 1207 (1925);
Prudential Ins. Co. of America v. National Bank of Commerce in New York, 227 N.Y. 510, 125 N.E. 824,
15 A.L.R. 146 (1920).
- 2 Navrides v. Zurich Ins. Co., 5 Cal. 3d 698, 97 Cal. Rptr. 309, 488 P.2d 637, 49 A.L.R.3d 828 (1971); Liberty
Mut. Ins. Co. v. Enjay Chemical Co. (now Exxon Corp.), 316 A.2d 219 (Del. Super. Ct. 1974); McFadden
v. Follrath, 114 Minn. 85, 130 N.W. 542 (1911).
- 3 M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co. of Louisiana, 159 La. 752, 106 So. 292 (1925);
Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935).
- 4 Georg v. Metro Fixtures Contractors, Inc., 178 P.3d 1209, 66 U.C.C. Rep. Serv. 2d 477 (Colo. 2008).
- 5 In re Feagins, 439 B.R. 165 (Bankr. D. Haw. 2010); Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative
Finance & Investments, L.L.C., 2009 MT 36, 349 Mont. 207, 203 P.3d 744 (2009).

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3 Am. Jur. 2d Agency § 252

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A. Duties and Liability of Principal to Third Person

1. In General

§ 252. Agent's statements and declarations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 156

Forms

Forms relating to admissions and representations of agents, generally, see Am. Jur. Pleading and Practice Forms, Agency [Westlaw® Search Query]

A representation made by an authorized agent of the principal is binding upon the principal.¹ That is, all statements and declarations made by an agent within the scope of his or her employment and with the actual or apparent authority of the principal are binding upon the principal, and the principal is responsible therefore² regardless of the unsuccessful efforts of the principal to prevent such misrepresentations.³ A principal cannot repudiate statements made by an agent in the course of the employment, and fairly within the agent's real or apparent authority,⁴ and the principal is bound by the agent's material representations of fact to the same extent as if the principal had made them personally.⁵ For instance, an agent's misrepresentations bind the principal if the agent was authorized to represent the principal in obtaining the contract.⁶

Observation:

Where the evidence supports a finding that an agent made misrepresentations simultaneously on behalf of distinct entities, there is no difference in the fact of liability of the two as principals.⁷

On the other hand, an agent cannot bind the principal by statements which are not made in the course of, and within the scope of, the business being transacted for the principal.⁸ Accordingly, a principal cannot be held responsible for wrongful advice given by an agent where the advice was neither actually authorized nor within the scope of the employment so that it might have been apparently authorized.⁹ Nor can the third person hold the principal liable for representations made by an agent if the third person did not rely thereon to his or her damage.¹⁰ Moreover, the principal is not liable for statements of the agent which are not representations but are merely trade talk of the agent, which the third person is as capable of estimating as is anyone else.¹¹

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Footnotes

- 1 [In re Payroll Express Corp.](#), 186 F.3d 196 (2d Cir. 1999).
- 2 [Putnam v. DeRosa](#), 963 F.2d 480 (1st Cir. 1992); [F.T.C. v. Medical Billers Network, Inc.](#), 543 F. Supp. 2d 283 (S.D. N.Y. 2008); [La Abra Silver Min. Co. v. U.S.](#), 35 Ct. Cl. 623, 175 U.S. 423, 20 S. Ct. 168, 44 L. Ed. 223 (1899).
As to the admissibility of an agent's extrajudicial statements to prove agency or authority, see [§ 330](#).
[F.T.C. v. Medical Billers Network, Inc.](#), 543 F. Supp. 2d 283 (S.D. N.Y. 2008).
- 3 [Georgiades v. Biggs](#), 197 Va. 630, 90 S.E.2d 850 (1956).
- 4 [Bauman v. Grand Trunk Western R.R.](#), 18 Mich. App. 450, 171 N.W.2d 468 (1969); [MacKay v. McIntosh](#), 270 N.C. 69, 153 S.E.2d 800 (1967); [O'Daniel v. Streeby](#), 77 Wash. 414, 137 P. 1025 (1914).
- 5 [In re Tri-State Armored Services, Inc.](#), 332 B.R. 690 (Bankr. D. N.J. 2005), order aff'd, 366 B.R. 326 (D.N.J. 2007) (applying New Jersey law).
- 6 [STMicroelectronics v. Credit Suisse Group](#), 775 F. Supp. 2d 525 (E.D. N.Y. 2011).
- 7 [Grease Monkey Intern., Inc. v. Montoya](#), 904 P.2d 468 (Colo. 1995); [Rheuban v. Commercial Inv. Trust](#), 81 N.H. 498, 128 A. 807, 41 A.L.R. 1280 (1925); [Eastern Dist. Piece Dye Works v. Travelers' Ins. Co.](#), 234 N.Y. 441, 138 N.E. 401, 26 A.L.R. 1505 (1923).
- 8 [Rheuban v. Commercial Inv. Trust](#), 81 N.H. 498, 128 A. 807, 41 A.L.R. 1280 (1925).
- 9 [Atlantic Nat. Bank of Boston v. Korrick](#), 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 (1926).
- 10 [Atlantic Nat. Bank of Boston v. Korrick](#), 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 (1926).
- 11 [Atlantic Nat. Bank of Boston v. Korrick](#), 29 Ariz. 468, 242 P. 1009, 43 A.L.R. 1184 (1926).

3 Am. Jur. 2d Agency § 253

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 253. Payment to agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 154(1)

A.L.R. Library

[Payment to broker or agent authorized to sell real property, as payment to principal, 30 A.L.R.2d 805](#)

Payment made to an agent having authority to collect¹ or receive² such payment is equivalent to payment to the principal. This is true whether the agent has express authority to collect, whether the authority is implied as incidental to the agency transaction, or whether it arises from the fact that the principal has held the agent out as having apparent authority to collect, and the debtor has relied upon such appearance of authority.³ A provision in an agency agreement that the agent endorse checks made payable to the agent in favor of the principal and deposit them to the account of the principal places no burden on the debtor to see to the proper application of the funds.⁴

The principal is bound, however, only where the person to whom payment is made is in fact an authorized agent of the person to whom the indebtedness is owing; the debtor makes payment to one other than the principal at his or her own risk and is bound to know the authority of the agent in this respect.⁵

Footnotes

- 1 Weickert v. Alliant Health Systems, Inc., 954 S.W.2d 314 (Ky. 1997).
- 2 Weickert v. Alliant Health Systems, Inc., 954 S.W.2d 314 (Ky. 1997); Alderman v. Davidson, 326 Or. 508, 954 P.2d 779 (1998).
- 3 As to the effect of the agent's forgery of the principal's endorsement on a check received by the agent as payment to the principal, see § 251.
- 4 Bunch v. Tom Althauser Realty, Inc., 55 Ohio App. 2d 123, 9 Ohio Op. 3d 273, 379 N.E.2d 613 (10th Dist. Franklin County 1977); Ulen v. Knectle, 50 Wyo. 94, 58 P.2d 446, 111 A.L.R. 565 (1936).
- 5 Haynes Petroleum Corp. v. Turlington, 261 N.C. 475, 135 S.E.2d 43 (1964).
- As to the tort liability of a third person to the principal with respect to property or funds wrongfully disposed of by the agent, see § 271.
- Catlin v. Reed, 1929 OK 485, 141 Okla. 14, 283 P. 549, 67 A.L.R. 1410 (1929); Case v. Shepherd, 140 W. Va. 305, 84 S.E.2d 140 (1954).
- As to the burden of proving the authority of an agent to receive payment, see § 324.

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

1. In General

§ 254. Credit given to agent alone

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 133

If a party is informed that the person with whom he or she deals is merely the agent for another, and yet such party prefers to contract with the agent personally on his or her own credit, such party will not be allowed afterward to charge the principal.¹ In order for this rule of nonliability of the principal to apply, however, it is necessary for both the creditor and the agent to have the same understanding, namely, that the agent is personally and solely bound to pay the debt. The burden is on the principal to show that it was the intention of the third person and the agent that exclusive credit was being given to the agent.²

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Footnotes

- 1 [Ford v. Williams](#), 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); [Rochell v. Moore-Handley Hardware Co.](#), 239 Ala. 555, 196 So. 143 (1940); [Dexter Horton Nat. Bank v. Seattle Homeseekers' Co.](#), 82 Wash. 480, 144 P. 691 (1914).
- 2 [Rochell v. Moore-Handley Hardware Co.](#), 239 Ala. 555, 196 So. 143 (1940).

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 255. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1) to 178(4), 182

Forms

Forms relating to notice to agent imputed to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Generally, the principal is chargeable with, and bound by, the knowledge of or notice to an agent received while the agent is acting within the scope of his or her authority and in reference to a matter over which such authority extends.¹ The fact that the knowledge or notice of the agent was not actually communicated does not prevent the operation of the general rule because the agent's knowledge or notice is imputed to the principal and is constructive notice.²

According to the Restatement Third of Agency, for purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal.³ The preceding does not apply, however, if the agent acts adversely to the principal⁴ or if the agent is subject to a duty to another not to disclose the fact to the principal.⁵ Furthermore, a notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification unless the person who gives the notification knows or has reason to know that the agent is acting adversely to the principal.⁶

Observation:

A notification is a manifestation that is made in the form required by agreement among parties or by applicable law, or in a reasonable manner in the absence of an agreement or an applicable law, with the intention of affecting the legal rights and duties of the notifier in relation to rights and duties of persons to whom the notification is given.⁷

A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.⁸

An agent who acquires property for a principal may know or have reason to know material facts about the property, including facts relevant to other persons' interests and claims. Consequently, notice of such facts is generally imputed to the principal.⁹

Caution:

Although the principal is charged with the knowledge possessed by its agent, that the agent should, in good faith and the exercise of ordinary care and diligence, have passed on to the principal,¹⁰ the uncommunicated knowledge of an agent is not imputed to the principal for the purpose of determining whether he or she acted in good faith because the principal's good faith must be determined on the basis of facts of which the principal had actual knowledge.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Under Texas law, principal is charged both with acts of agent committed within scope of his duties and with knowledge of such acts. *Duffie v. Wichita County*, 990 F. Supp. 2d 695 (N.D. Tex. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 Curtis, Collins & Holbrook Co. v. U.S., 262 U.S. 215, 43 S. Ct. 570, 67 L. Ed. 956 (1923); River Colony
Estates General Partnership v. Bayview Financial Trading Group, Inc., 287 F. Supp. 2d 1213 (S.D. Cal.
2003) (applying California law); Elbit Systems, Ltd. v. Credit Suisse Group, Fed. Sec. L. Rep. (CCH) P
97252, 2013 WL 66466 (S.D. N.Y. 2013); In re Stacy, 405 B.R. 872 (Bankr. N.D. Ohio 2009).
2 Elbit Systems, Ltd. v. Credit Suisse Group, Fed. Sec. L. Rep. (CCH) P 97252, 2013 WL 66466 (S.D. N.Y.
2013); In re Evans, 460 B.R. 848 (Bankr. S.D. Miss. 2011) (applying Mississippi law); O'Riordan v. Federal
Kemper Life Assur., 36 Cal. 4th 281, 30 Cal. Rptr. 3d 507, 114 P.3d 753 (2005).
3 Restatement Third, Agency § 5.03.
4 Restatement Third, Agency § 5.03(a).
5 Restatement Third, Agency § 5.03(b).
6 Restatement Third, Agency § 5.02(1).
7 Restatement Third, Agency § 5.01(1).
8 Restatement Third, Agency § 5.01(3).
9 Restatement Third, Agency § 5.03, comment d(3).
10 Diaz v. Federal Express Corp., 373 F. Supp. 2d 1034 (C.D. Cal. 2005) (applying California law).
11 Harte v. United Benefit Life Ins. Co., 66 Cal. 2d 148, 56 Cal. Rptr. 889, 424 P.2d 329 (1967).

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3 Am. Jur. 2d Agency § 256

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 256. Basis and rationale of rule charging principal with notice to or knowledge of agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1) to 178(4), 182

Some courts ascribe as the reason for the rule that a principal is charged with notice to or knowledge of an agent the theory that the agent, acting within the scope of his or her authority, is, as to the matters embraced therein, the alter ego of the principal.¹ Other courts base the rule on the duty of the agent to communicate all material information to the principal and the presumption that the agent has done so.² This rule is known as the "imputation doctrine."³

The rule of imputed knowledge is a rule of public policy⁴ based upon the necessities of general commercial relationships, and where a principal acts through an agent, a third person dealing with the agent is entitled to rely upon the agent's knowledge and notice, and it binds the principal⁵ who should incur the risks of the agent's infidelity or lack of diligence rather than innocent third parties.⁶ In other words, it is the principal who has placed the agent in the position of trust and confidence who should suffer rather than an innocent stranger.⁷ Thus, the principal is bound by notice to his or her agent for the same reason and to the same extent that the principal is bound by the act of his or her agent.⁸

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Footnotes

- 1 St. Louis Fire & Marine Ins. Co. v. Witney, 96 F. Supp. 555 (M.D. Pa. 1951); Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924).
- 2 Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U.S. 613, 36 S. Ct. 676, 60 L. Ed. 1202 (1916); Nebraska Public Employees Local Union 251 v. Otoe County, 257 Neb. 50, 595 N.W.2d 237 (1999); Macris v. Sculptured Software, Inc., 2001 UT 43, 24 P.3d 984 (Utah 2001).

As to whether the principal is charged with the agent's knowledge even if it is not communicated to the principal, see § 255.

- 3 NCP Litigation Trust v. KPMG, 399 N.J. Super. 606, 945 A.2d 132 (Law Div. 2007).
4 Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924); State Farm Fire & Cas. Co.
v. Sevier, 272 Or. 278, 537 P.2d 88 (1975).
5 Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948).
6 State Farm Fire & Cas. Co. v. Sevier, 272 Or. 278, 537 P.2d 88 (1975).
7 Belmont v. MB Inv. Partners, Inc., 708 F.3d 470 (3d Cir. 2013) (applying Pennsylvania law).
8 Witcher v. JSD Properties, LLC, 286 Ga. 717, 690 S.E.2d 855 (2010).

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3 Am. Jur. 2d Agency § 257

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 257. Necessity of agency relationship

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1) to 178(4), 182

The knowledge of one person is generally only imputed to another where there exists a special legal relationship between the two.¹ Accordingly, in order for one person's knowledge to be imputed to another under the law of agency, the relationship of principal and agent must, in fact, exist between the parties.²

Practice Tip:

For an agent's actions to be imputed to a principal, a party must demonstrate an agency relationship by showing the manifestation by the principal that the agent shall act for him or her, the agent's acceptance of the undertaking, and an understanding of the parties that the principal is to be in control of the undertaking.³

Moreover, the knowledge must be that of a person who is executing some agency and not that of one acting merely in some ministerial capacity, such as employee or clerk.⁴

If the one receiving knowledge is the agent of the other party or of someone other than the alleged principal, the latter cannot be charged with knowledge.⁵ However, any knowledge acquired by an agent within the scope of his or her employment is chargeable to the principal, even though the agent is not under the full control of the principal, as for example, where the agent is temporarily working for someone else, at least, where the knowledge had been acquired earlier.⁶

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Footnotes

- 1 CIT Group/Equipment Financing, Inc. v. Roberts, 885 So. 2d 185 (Ala. Civ. App. 2003).
- 2 Illinois Bankers' Life Ass'n v. Mann, 158 Ark. 425, 250 S.W. 887 (1923); Clement v. Young-McShea Amusement Co., 70 N.J. Eq. 677, 67 A. 82 (Ct. Err. & App. 1906); Norfolk & W.R. Co. v. Harman, 91 Va. 601, 22 S.E. 490 (1895).
- 3 De Lage Landen Financial Services, Inc. v. Rasa Floors, LP, 792 F. Supp. 2d 812 (E.D. Pa. 2011) (applying Pennsylvania law).
- 4 Booker v. Booker, 208 Ill. 529, 70 N.E. 709 (1904).
- 5 Allen & Scott v. Stahl, 1938 OK 3, 181 Okla. 527, 75 P.2d 204 (1938).
As to the imputation of knowledge of an agent to the principal in a dual agency situation, see § 265.
- 6 Harris v. Gulf Refining Co., 240 F.2d 249 (5th Cir. 1957).

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 258. Relevance to agency and agent's authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1) to 177(6), 182

Generally, the knowledge of an agent may be imputed to the principal only where it is relevant to the agency and to the matters entrusted to the agent.¹

Observation:

An agent brings the totality of relevant information that the agent then knows to the relationship with a particular principal.²

As also stated, knowledge is imputed to the principal when the agent is acting within the scope of his or her authority, and the knowledge pertains to matters within the scope of the agent's authority.³ Similarly, a principal is chargeable with the knowledge of his or her agent that is received by the agent in the due course of his or her employment and is related to matters within his or her authority⁴ or is related to the agency's purpose.⁵ Conversely, knowledge acquired or notice received by an agent which does not pertain to the duties of the agent,⁶ which does not relate to the subject matter of the employment,⁷ or which affects matters outside the scope of the agency⁸ is not chargeable to the principal unless actually communicated to him or her.

While the "alter ego" doctrine may align the identity of principal and agent with regard to their dealings with others, it does not transform the agent into an acceptable legal repository for the unauthorized disclosure of confidential information that the principal learned within another confidential relationship.⁹

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Footnotes

- 1 Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 33 U.C.C. Rep. Serv. 1778 (6th Cir. 1982); Stone v. Mellon Mortg. Co., 771 So. 2d 451 (Ala. 2000); Redman v. Walters, 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (1st Dist. 1979).
- 2 Trustees of Chicago Plastering Institute Pension Trust v. Elite Plastering Co., Inc., 603 F. Supp. 2d 1143 (N.D. Ill. 2009).
- 3 In re Sedlacek, 325 B.R. 202 (Bankr. E.D. Tenn. 2005).
- 4 McMillan v. LTV Steel, Inc., 555 F.3d 218 (6th Cir. 2009).
- 5 Madison v. George E. Fern Co., 54 Fed. Appx. 600 (6th Cir. 2002).
- 6 Thompson v. Sun Oil Co., 135 Fla. 731, 185 So. 837 (1939).
- 7 Gemmell v. Davis, 75 Md. 546, 23 A. 1032 (1892).
- 8 Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374 (1894); Commercial Union Ins. Co. v. Taylor, 169 Ga. App. 177, 312 S.E.2d 177 (1983); Columbia Auto Parts Co. v. Shuman Const. Co., 345 Mass. 82, 185 N.E.2d 746 (1962).
An agent's knowledge that the agent has acted or intends to act in a manner unauthorized by the principal is not imputed to the principal. *Restatement Third, Agency* § 5.03, comment b.
- 9 Biddle v. Warren Gen. Hosp., 86 Ohio St. 3d 395, 1999-Ohio-115, 715 N.E.2d 518 (1999).

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3 Am. Jur. 2d Agency § 259

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 259. Actual or constructive knowledge of agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1) to 177(6), 182

Although it is generally true that if an agent has actual knowledge of a fact, the principal is charged with the legal consequences of having reason to know the fact,¹ according to some courts, the principal may even be charged with the knowledge of that which the agent, by ordinary care, could have known,² especially where the agent has received sufficient information to awaken inquiry.³ Also, in this regard, the Restatement Third of Agency provides that for purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal.⁴

According to other courts, however, the principal is not affected by knowledge which the agent should have acquired in the performance of his or her duties unless the principal has a duty to others that care will be exercised in obtaining information.⁵

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Footnotes

- 1 [Murfam Farms, LLC ex rel. Murphy v. U.S.](#), 94 Fed. Cl. 235 (2010).
Notice to an agent is constructive notice to the principal. [In re Anderson](#), 330 B.R. 180 (Bankr. S.D. Tex. 2005).
- 2 [Fleming v. U.S.](#), 648 F.2d 1122, 61 A.L.R. Fed. 307 (7th Cir. 1981); [Neal v. Pender-Hyman Hardware Co.](#), 122 N.C. 104, 29 S.E. 96 (1898).
- 3 [Wittenbrock v. Parker](#), 102 Cal. 93, 36 P. 374 (1894).
- 4 Restatement Third, Agency § 5.03.

See § 255 for exceptions to this rule.

5 State v. One (1) Certain 1969 Ford Van, V. I. N.-E15AHD98177, 191 N.W.2d 662 (Iowa 1971); Linwood State Bank v. Lientz, 413 S.W.2d 248 (Mo. 1967).

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3 Am. Jur. 2d Agency § 260

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 260. Time and manner of agent's acquisition of knowledge or giving or receipt of notice

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 179(.5) to 179(3)

The rule under the Restatement Third of Agency is that when an agent is aware of a fact at the time of taking authorized action on behalf of a principal and the fact is material to the agent's duties to the principal, notice of the fact is imputed to the principal although the agent learned the fact prior to the agent's relationship with the principal whether through formal education, prior work, or otherwise. Likewise, notice is imputed to the principal of material facts that an agent learns casually or through experiences in the agent's life separate from work.¹ However, there is authority for the view that a principal is not affected by notice which comes to the agent outside the course of the transaction in which the agent is employed.² Nevertheless, the knowledge of an agent will be charged to the principal, although not acquired in the course of the same transaction from which the principal's rights and liabilities arise, where it is clear that the information the agent obtained in a former transaction was so precise and definite that the agent was aware of it while engaged in the second transaction and where the agent was at liberty to communicate such information to the principal.³ In this regard, it has been said that the relevant consideration is whether the agent has the knowledge at the time it becomes relevant in his or her work for the principal; if the agent has it at that time, the principal is bound regardless of whether the agent's knowledge was acquired as a result of the agency.⁴

A principal is charged with the knowledge which his or her agent acquires before the commencement of the agency relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal,⁵ but an agent may not be under any duty to disclose facts learned before an agency relationship if those facts have since been forgotten.⁶ The burden, therefore, is on the party seeking to charge the principal with the knowledge acquired by the agent to prove that such knowledge remained present in the mind of the agent at the time of the transaction in relation to which knowledge is sought to be imputed to the principal; if the proof is doubtful, the principal will not be held chargeable with notice thereof.⁷

Generally, provided the information was not obtained in such a way as to make it the legal duty of the agent not to divulge it to the principal, knowledge of an agent acquired prior to the existence of the agency may be chargeable to the principal if it is shown that the agent, while acting for the principal in a transaction to which the information is material, is aware of the information or where it was acquired so recently or under such circumstances that it will be presumed to have been in the agent's mind and memory at the time of the transaction in question.⁸

Notice to one who has been an agent, after the termination of the agency and the business involved therein, is ordinarily not notice to the former principal,⁹ and the latter will not be charged when notice is given to a former agent by a person who knows that the agency has come to an end.¹⁰ On the other hand, a principal may be chargeable with notice given to a former agent if the person giving the notice has a right to rely upon the appearance of the continuance of the agency and has no reason to be aware that it has terminated.¹¹

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Footnotes

- 1 Restatement Third, Agency § 5.03, comment e.
- 2 Cooke v. Mesmer, 164 Cal. 332, 128 P. 917 (1912); Howard Ins. Co. v. Halsey, 8 N.Y. 271, 1853 WL 6014 (1853).
- 3 Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374 (1894); Snyder v. Partridge, 138 Ill. 173, 29 N.E. 851 (1891); Trentor v. Pothen, 46 Minn. 298, 49 N.W. 129 (1891); Pennoyer v. Willis, 26 Or. 1, 36 P. 568 (1894).
- 4 Fireman's Fund Indem. Co. v. Boyle General Tire Co., 392 S.W.2d 352 (Tex. 1965); Busk v. Hoard, 65 Wash. 2d 126, 396 P.2d 171 (1964).
- 5 O'Riordan v. Federal Kemper Life Assur., 36 Cal. 4th 281, 30 Cal. Rptr. 3d 507, 114 P.3d 753 (2005).
- 6 Trustees of Chicago Plastering Institute Pension Trust v. Elite Plastering Co., Inc., 603 F. Supp. 2d 1143 (N.D. Ill. 2009).
- 7 Constant v. University of Rochester, 111 N.Y. 604, 19 N.E. 631 (1889); American Liberty Ins. Co. v. Breslerman, 201 Va. 822, 113 S.E.2d 862 (1960).
- 8 In re Distilled Spirits, 78 U.S. 356, 20 L. Ed. 167, 1870 WL 12760 (1870); Ruotal Corp., N. W., Inc. v. Ottati, 391 So. 2d 308 (Fla. 4th DCA 1980); Royston v. Bank of America, N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008).
- 9 First Nat. Bank v. Gunhus, 133 Iowa 409, 110 N.W. 611 (1907).
- 10 Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W.2d 196 (1945).
- 11 Lockwood v. Dillenbeck, 104 A.D. 71, 93 N.Y.S. 321 (2d Dep't 1905).

3 Am. Jur. 2d Agency § 261

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 261. Time of imputation of knowledge or notice to principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 179(.5) to 179(3)

The Restatement Third of Agency provides that notice of a fact that an agent learns following the termination of the agent's actual authority is not imputed to the principal.¹ Thus, if a fact is of general or continuing significance, material not merely to the matter at hand but also to subsequent business of the principal, the principal is charged with the agent's notice thereof in a transaction that occurs after the agency is terminated.² In any case, where the principal claims through a transaction, he or she is chargeable with knowledge of the agent gained relative thereto even though the agent may no longer be in the principal's employ.³ However, a principal is not chargeable with the knowledge of an agent employed merely to conclude a particular transaction where the former agent abandoned the matter without result, and it is subsequently transacted without reference to the former agency,⁴ or where the fact had no apparent materiality to any business of the principal other than that then transacted, and the subsequent transaction is independent thereof.⁵

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Footnotes

1 Restatement Third, Agency § 5.03, comment f.

2 *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395 (8th Cir. 1970).

3 *U.S. v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966); *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395 (8th Cir. 1970); *Campen v. Executive House Hotel, Inc.*, 105 Ill. App. 3d 576, 61 Ill. Dec. 358, 434 N.E.2d 511 (1st Dist. 1982).

4 *Irvine v. Grady*, 85 Tex. 120, 19 S.W. 1028 (1892).

5 *Murray v. Preferred Acc. Ins. Co.*, 199 Iowa 1195, 201 N.W. 595 (1925).

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3 Am. Jur. 2d Agency § 262

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 262. Agent acting adversely or fraudulently

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 180, 181

Forms

Forms relating to notice to agent imputed to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Generally, a risk of loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent.¹ The Restatement Third of Agency, however, provides that, for purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.² Nevertheless, notice is imputed when necessary to protect the rights of a third party who dealt with the principal in good faith³ or when the principal has ratified or knowingly retained a benefit from the agent's action.⁴

Observation:

A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.⁵

In this regard, there is authority for the view that the agent's knowledge generally is not imputed to the principal where the conduct and dealings of an agent are such as to raise a clear presumption that he or she will not communicate to the principal the facts in controversy,⁶ such as where the agent is in reality acting in his or her own business or for his or her personal interest and adversely to the principal, or is acting fraudulently against the interests of the principal,⁷ or for any other reason has a motive or interest in concealing the facts from the principal.⁸

The view has also been followed that an agent's adverse dealings or fraud cannot alter the legal effect of the agent's knowledge or notice with respect to the principal with regard to third persons who had no connection with such agent in relation to the perpetration of the adverse dealings or fraud and no knowledge that the agent was acting adversely.⁹ In this regard, the Restatement Third of Agency provides that a notification by or to a third person to or by an agent is effective as notice to or by the principal unless the third person has notice that the agent is acting adversely to the principal.¹⁰ Without notice that an agent acts adversely to a principal, a third party who deals with the principal through the agent lacks reason to believe that communications between them will not proceed according to customary routines or that the agent will conceal information to be gleaned from the third party's efforts to communicate with the principal. The third party also lacks reason to arrange alternate channels of communication with the principal. On the other hand, once on notice of the agent's adverse position, the third party has reason to doubt whether the agent will seek to further the principal's best interests in communications, including notifications, received from or given to the third party.¹¹

The rule that the knowledge of an agent acting adversely to the principal will not be imputed to the latter may also not apply if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby.¹²

The doctrine of imputed knowledge may be invoked where the principal fails to disavow what was assumed to be said and done in his or her behalf by the agent.¹³ If the principal learns the fact before his or her position has changed and still knowingly retains a benefit obtained through the act of the agent which the principal would not have received otherwise, he or she cannot escape responsibility.¹⁴

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Footnotes

- 1 Kirschner v. KPMG LLP, 15 N.Y.3d 446, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010).
- 2 Restatement Third, Agency § 5.04.
- 3 Restatement Third, Agency § 5.04(a).
- 4 Restatement Third, Agency § 5.04(b).
- 5 Restatement Third, Agency § 5.04.
- 6 Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U.S. 613, 36 S. Ct. 676, 60 L. Ed. 1202 (1916); Schmidt v. Fortis Ins. Co., 349 F. Supp. 2d 1171 (N.D. Iowa 2005); BancInsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton County, Inc., 830 F. Supp. 2d 294 (E.D. Ky. 2011) (applying Kentucky law).

- 7 American Nat. Bank of Nashville v. Miller, 229 U.S. 517, 33 S. Ct. 883, 57 L. Ed. 1310 (1913); Villains, Inc. v. American Economy Ins. Co., 870 F. Supp. 2d 792 (N.D. Cal. 2012) (applying California law); Associated Bank, N.A. v. Stewart Title Guar. Co., 881 F. Supp. 2d 1058 (D. Minn. 2012) (applying Minnesota law); In re Sunpoint Securities, Inc., 377 B.R. 513 (Bankr. E.D. Tex. 2007) (applying Texas law).
- 8 Martin v. Xarin Real Estate, Inc., 703 F.2d 883 (5th Cir. 1983); Associated Bank, N.A. v. Stewart Title Guar. Co., 881 F. Supp. 2d 1058 (D. Minn. 2012) (applying Minnesota law); Allen & Scott v. Stahl, 1938 OK 3, 181 Okla. 527, 75 P.2d 204 (1938); San Angelo Life & Acc. Ass'n v. Haynes, 106 S.W.2d 363 (Tex. Civ. App. Austin 1937), writ dismissed.
- 9 Armstrong v. Ashley, 204 U.S. 272, 27 S. Ct. 270, 51 L. Ed. 482 (1907); Sussel Co. v. First Federal Sav. and Loan Ass'n of St. Paul, 307 Minn. 199, 238 N.W.2d 625 (1976); Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979).
- 10 Restatement Third, Agency § 5.02.
- 11 Restatement Third, Agency § 5.02, comment c.
- 12 State Farm Fire & Cas. Co. v. Sevier, 272 Or. 278, 537 P.2d 88 (1975); City of Fort Worth v. Pippen, 439 S.W.2d 660 (Tex. 1969).
- 13 As to the right of third persons to invoke the rule of imputation of the agent's knowledge to the principal, see § 266.
- 14 Anderson v. General American Life Ins. Co., 141 F.2d 898 (C.C.A. 6th Cir. 1944).
- 14 Maryland Cas. Co. v. Tulsa Indus. Loan & Inv. Co., 83 F.2d 14, 105 A.L.R. 529 (C.C.A. 10th Cir. 1936).

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 263. Agent acting adversely or fraudulently— Where agent is sole representative in transaction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  180, 181

A qualification of the rule that the knowledge of an agent engaged in an independent fraudulent act is not the knowledge of the principal¹ applies where the agent, although engaged in perpetrating such an act on his or her own account, is the sole representative of the principal.² In such case, a principal who asserts or stands on the transaction, either affirmatively or defensively, or seeks to retain the benefits of the transaction, is charged with the agent's knowledge.³ On the other hand, the principal may not be liable for the acts of the agent where the third party did not reasonably believe that he or she was dealing solely with the agent.⁴

CUMULATIVE SUPPLEMENT

Cases:

Under New York law, when principal and agent are one and the same, the adverse interest exception is itself subject to an exception styled the "sole actor" rule, which imputes the agent's knowledge to the principal notwithstanding the agent's self-dealing. [In re Bernard L. Madoff Inv. Securities LLC.](#), 721 F.3d 54 (2d Cir. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 § 262.
- 2 In re Hoang, 449 B.R. 850 (Bankr. D. Md. 2011); Cantrell v. Putnam County Sheriff's Dep't, 894 N.E.2d
1081 (Ind. Ct. App. 2008); Mann v. Adventure Quest, Inc., 186 Vt. 14, 2009 VT 38, 974 A.2d 607 (2009).
- 3 Curtis, Collins & Holbrook Co. v. U.S., 262 U.S. 215, 43 S. Ct. 570, 67 L. Ed. 956 (1923); Stone & Webster
Engineering Corp. v. Hamilton Nat. Bank, for Use and Ben. of Emp. Liability Assur. Corp., 199 F.2d 127
(6th Cir. 1952); Puget Sound Nat. Bank v. St. Paul Fire and Marine Ins. Co., 32 Wash. App. 32, 645 P.2d
1122 (Div. 1 1982).
- 4 Anderson v. General American Life Ins. Co., 141 F.2d 898 (C.C.A. 6th Cir. 1944); Pearl v. Selective Life
Ins. Co., 8 Ariz. App. 152, 444 P.2d 443 (1968).

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A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 264. Agent having duty of nondisclosure

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1), 177(2), 180

Under the Restatement Third of Agency, notice of a fact that an agent knows or has reason to know is imputed to the principal unless the agent is subject to a duty to another not to disclose the fact to the principal.¹ Thus, an exception to the general rule as to the imputation of the agent's knowledge to the principal is that where the agent owes a duty to another not to communicate facts that have come to his or her knowledge, the law will not impute knowledge thereof to the principal.² Likewise, if one in the course of his or her business as agent for another obtains knowledge from which a trust would arise, and afterward becomes the agent of a subsequent purchaser in an independent and unconnected transaction, such person's previous knowledge is not notice to such other person for whom he or she acts.³

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Footnotes

1 Restatement Third, Agency § 5.03(b).

2 TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta, 696 F.2d 1135 (5th Cir. 1983); Imperial Finance Corp. v. Finance Factors, Limited, 53 Haw. 203, 490 P.2d 662 (1971); Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 38 A.L.R. 814 (1924).

3 Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374 (1894); Littauer v. Houck, 92 Mich. 162, 52 N.W. 464 (1892).

3 Am. Jur. 2d Agency § 265

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 265. Dual agency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1), 177(2), 180

A.L.R. Library

[Imputation of knowledge of agent acting for both parties to transaction](#), 4 A.L.R.3d 224

Forms

Forms relating to dual agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Notice to or knowledge of a dual agent is imputed to both principals just as if the agent represented one principal alone.¹ Accordingly, the mistake of an agent acting as a dual agent becomes a mutual mistake of fact by both principals which prevents one principal from seeking to impose liability on the other for the mistake of the agent.² However, as is the case in a single agency relationship, knowledge or notice to a dual agent is not imputed when the agent was acting adversely or fraudulently with respect to the principal sought to be charged.³ This exception is, in turn, subject to the qualification that either

principal, knowingly receiving and retaining a benefit from the transaction which is tainted with fraud, is chargeable with knowledge of the fraud.⁴

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Footnotes

1 Astor v. Wells, 17 U.S. 466, 4 L. Ed. 616, 1819 WL 2207 (1819); Farr v. Newman, 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369, 4 A.L.R.3d 215 (1964); Foster v. Blake Heights Corp., 530 P.2d 815 (Utah 1974).

2 Messall v. Merlands Club, Inc., 233 Md. 29, 194 A.2d 793 (1963).

3 Herdan v. Hanson, 182 Cal. 538, 189 P. 440 (1920); Holley v. Jackson, 39 Del. Ch. 32, 158 A.2d 803 (1959); Florence v. De Beaumont, 101 Wash. 356, 172 P. 340, 4 A.L.R. 1565 (1918).

4 Mutual Assur. Co. of City of Norwich v. Norwich Sav. Soc., 128 Conn. 510, 24 A.2d 477, 139 A.L.R. 829 (1942).

As to the imputation of knowledge to a principal who retains the benefits of the fraudulent transaction, generally, see § 262.

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3 Am. Jur. 2d Agency § 266

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A. Duties and Liability of Principal to Third Person

2. Imputation to Principal of Knowledge of, or Notice to, Agent

§ 266. Who may invoke imputation; requirement of good faith

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 177(1), 177(2)

The rule of imputation of an agent's knowledge to the principal may apply even though the third persons have not known of or dealt with the agent in question if they have had dealings with the principal or with some other agent of the principal which make the matter material to the protection of the interests of such third persons.¹

The rule imputing an agent's knowledge to the principal is designed to protect only those who exercise good faith and is not intended to serve as a shield for unfair dealing by the third person.² The rule may not be invoked where third persons use the agent to further their own frauds upon the principal³ or where the third person did not intend or expect that the agent would communicate the facts or the truth to the principal.⁴

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Footnotes

¹ [Hale v. Depaoli](#), 33 Cal. 2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948); [State Farm Fire & Cas. Co. v. Sevier](#), 272 Or. 278, 537 P.2d 88 (1975).

² [Mutual Life Ins. Co. of New York v. Hilton-Green](#), 241 U.S. 613, 36 S. Ct. 676, 60 L. Ed. 1202 (1916); [Supreme Petroleum, Inc. v. Briggs](#), 199 Kan. 669, 433 P.2d 373 (1967); [Jacobs v. Metropolitan Life Ins. Co.](#), 39 So. 2d 346 (La. Ct. App., Orleans 1949).

³ [De Kay v. Hackensack Water Co.](#), 38 N.J. Eq. 158, 1884 WL 7490 (Ch. 1884); [National Life Ins. Co. v. Minch](#), 53 N.Y. 144, 1873 WL 9244 (1873); [De Ford v. National Life & Acc. Ins. Co.](#), 182 Tenn. 255, 185 S.W.2d 617 (1945).

- 4 Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U.S. 613, 36 S. Ct. 676, 60 L. Ed. 1202 (1916);
Vincennes Savings & Loan Ass'n v. St. John, 213 Ind. 171, 12 N.E.2d 127 (1938); De Ford v. National Life
& Acc. Ins. Co., 182 Tenn. 255, 185 S.W.2d 617 (1945).

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3 Am. Jur. 2d Agency XI B Refs.

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B. Duties and Liability of Third Person to Principal

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(3), 152(4), 159(1)

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Personal Liability

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3 Am. Jur. 2d Agency § 267

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

B. Duties and Liability of Third Person to Principal

1. In General

§ 267. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 152(4), 159(1)

A principal is entitled to the rights and benefits which result from the agent's authorized act, and the act of an agent within the scope of his or her authority or employment is in legal effect the act of the principal, and the latter is entitled to all the advantages flowing therefrom.¹ Consequently, the principal acquires equitable title to property, subject to all the incidents attached to such estate, from the moment of purchase, where the agent buys property of a third person, even though the deed or contract of sale is made out in the agent's name.² However, the third party with whom an unauthorized agent deals has the right to withdraw from the transaction at any time prior to ratification by the principal.³

Generally, one cannot threaten to take even a lawful step when the purpose is to turn an agent against his or her principal.⁴

Although a dismissal with prejudice of a claim against an agent generally constitutes a release of the principal if the claim against the principal is based on respondeat superior,⁵ a dismissal with prejudice of an agent does not act as a consent judgment, which releases the agent's principal from vicarious liability, but may instead act as a covenant not to sue, which preserves the right to pursue a claim against the principal on the basis of the principal's vicarious liability for the acts of the agent, where there is no indication that release of the principal was intended.⁶ In short, therefore, if all tort claims against an agent are dismissed with prejudice, then a subsequent tort claim based on the same facts will not lie against the agent's principal unless the parties agreed to the contrary.⁷

Footnotes

- 1 Epperson v. Helbron, 145 Ark. 566, 225 S.W. 345, 15 A.L.R. 597 (1920); Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 So. 230 (1893).
- 2 Follansbe v. Kilbreth, 17 Ill. 522, 1856 WL 5368 (1856).
- 3 Equity Mut. Ins. Co. v. General Cas. Co. of America, 139 F.2d 723 (C.C.A. 10th Cir. 1943).
- 4 Matter of FBN Food Services, Inc., 82 F.3d 1387 (7th Cir. 1996).
- 5 Cogan v. Allianz Life Ins. Co. of North America, 592 F. Supp. 2d 1349 (N.D. Ala. 2008) (applying Alabama law).
- 6 Larkin v. Otsego Memorial Hosp. Ass'n, 207 Mich. App. 391, 525 N.W.2d 475 (1994).
- 7 Preis v. Lexington Ins. Co., 508 F. Supp. 2d 1061 (S.D. Ala. 2007), aff'd, 279 Fed. Appx. 940 (11th Cir. 2008) (applying Alabama law).

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3 Am. Jur. 2d Agency § 268

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

B. Duties and Liability of Third Person to Principal

1. In General

§ 268. Liability on contract

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(3), 152(4), 159(1)

Forms

Forms relating to rescinding transactions, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Forms relating to third person to principal, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

According to the Restatement Third of Agency, when an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal¹ or an unidentified principal,² the principal and the third party are parties to the contract. Thus, courts have also declared that the other party to a contract made by an agent for a disclosed or partially disclosed principal, acting within his or her authority, apparent authority, or other agency power, is liable to the principal as if he or she had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract,³ and if the agent is authorized to make a contract, the other party is bound upon it although, at the time of entering into the contract, such party does not believe that the agent is authorized to make it.⁴ However, if an agent procures a contract by illegal means, the principal, though ignorant of, and not consenting to, the wrongful act, is affected by it to the extent that he or she cannot enforce the contract so secured.⁵

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Footnotes

- 1 Restatement Third, Agency § 6.01(1).
- 2 Restatement Third, Agency § 6.02(1).
- 3 *Ford v. Williams*, 62 U.S. 287, 21 How. 287, 16 L. Ed. 36, 1858 WL 9383 (1858); *Lake Shore Management Co. v. Blum*, 92 Ill. App. 2d 47, 235 N.E.2d 366 (1st Dist. 1968); *Willamette-Western Corp. v. Lowry*, 279 Or. 525, 568 P.2d 1339, 22 U.C.C. Rep. Serv. 882 (1977).
- 4 *Willamette-Western Corp. v. Lowry*, 279 Or. 525, 568 P.2d 1339, 22 U.C.C. Rep. Serv. 882 (1977).
- 5 *Dimock State Bank v. Boehnen*, 46 S.D. 50, 190 N.W. 485 (1922); *Honaker v. Board of Education of Pocatalico Dist.*, 42 W. Va. 170, 24 S.E. 544 (1896).

As to a third person's defenses in an action by a principal on a contract made by an agent, see § 309.

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3 Am. Jur. 2d Agency § 269

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

B. Duties and Liability of Third Person to Principal

2. Tort Liability

§ 269. Generally; fraud

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 152(4), 159(1)

A third person is liable in tort for damages and injuries he or she caused to the property or interests of the principal in the same manner and to the same extent as if no agency existed.¹ Where a third person perpetrates a fraud upon an agent, either by misrepresentation or by silence, the fraud is considered as worked upon the principal, and the principal has a right of action against the third person for redress.²

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Footnotes

- 1 [New Jersey Steam Nav. Co. v. Merchant's Bank of Boston](#), 47 U.S. 344, 6 How. 344, 12 L. Ed. 465, 1848 WL 6458 (1848); [First Nat. Bank of Greenfield v. Marietta & C. R. Co.](#), 20 Ohio St. 259, 1870 WL 33 (1870).
- 2 [Leeper v. Beltrami](#), 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12, 77 A.L.R.2d 803 (1959); [Liberty Nat. Bank & Trust Co. v. Gruenberger](#), 477 S.W.2d 503 (Ky. 1972).

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3 Am. Jur. 2d Agency § 270

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B. Duties and Liability of Third Person to Principal

2. Tort Liability

§ 270. Causing or aiding breach of duty by agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(3), 152(4), 159(1)

A person who intentionally causes or assists an agent to violate a duty to the principal is subject to liability in tort for the harm such person has caused the principal or in a restitutionsal action for any profit such person derived from the transaction.¹ Thus, an agent's breach of duty to the principal is a tort, as well as a breach of contract, and the one procuring such breach is a joint tortfeasor.²

A person who, knowing that the other party to a transaction has employed an agent to conduct a transaction for him or her, employs the agent on his or her own account in such transaction is subject to liability to the other party unless such person reasonably believes that the other party acquiesces in the double employment.³

Generally, however, the third person is not liable to the principal for the agent's breach of duty if he or she did not participate in the agent's wrongful act.⁴ Thus, a principal may not recover from another on the basis of a misrepresentation made to him or her by the principal's own agent.⁵

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Footnotes

¹ [Phillips Chemical Co. v. Morgan](#), 440 So. 2d 1292 (Fla. 3d DCA 1983); [Farmers and Merchants Nat. Bank of Bridgeton v. Boardwalk Nat. Bank](#), 101 N.J. Super. 528, 245 A.2d 35, 5 U.C.C. Rep. Serv. 575 (App. Div. 1968); [St. Francis S & L Ass'n v. Hearthside Homes, Inc.](#), 65 Wis. 2d 74, 221 N.W.2d 840 (1974).

- 2 Homan v. Hall, 102 Neb. 70, 165 N.W. 881 (1917); Sleeper v. Baker, 22 N.D. 386, 134 N.W. 716 (1911);
Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509 (1942).
- 3 Martin Co. v. Commercial Chemists, Inc., 213 So. 2d 477 (Fla. 4th DCA 1968); Mackey v. Rootes Motors
Inc., 348 Mass. 464, 204 N.E.2d 436 (1965).
- 4 Michigan Milling Co. v. Vernon State Bank, 235 Mich. 318, 209 N.W. 44, 45 A.L.R. 1477 (1926).
- 5 Traylor v. Gray, 547 S.W.2d 644 (Tex. Civ. App. Corpus Christi 1977), writ refused n.r.e., (July 6, 1977).

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3 Am. Jur. 2d Agency § 271

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

B. Duties and Liability of Third Person to Principal

2. Tort Liability

§ 271. Property or funds wrongfully disposed of by agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(3), 152(4), 159(1)

Where money or property is entrusted to an agent for a particular purpose, it is impressed by law with a trust in favor of the principal until it has been devoted to such purpose; if it is wrongfully diverted by the agent, such trust follows the fund or property in the hands of a third person, and the principal is entitled to pursue and recover it so long as it can be traced and identified, and no superior equities have intervened.¹ However, if the recipient has parted with something of value and has no knowledge of the breach of faith, he or she will incur no responsibility; the doctrine that an agent disposing of the principal's property without authority transfers no title as against the principal does not apply to currency or negotiable instruments without restrictive endorsement where they have come into the hands of a bona fide purchaser for value without notice.² On the other hand, if an agent acquires personal property with the principal's funds, it may be followed into the hands of a third person, though innocent, having no notice of the right of the principal, who purchased for value, because a third person cannot ordinarily obtain any better title than the agent had.³

Furthermore, the principal is under no duty to a third person to discover and notify the latter of a wrongful disposal of property by an agent who does not assume to act for the principal in disposing of the property; consequently, the principal is not liable or responsible for the agent's fraudulent disposal or conversion of the principal's property or for the failure, in advance of the discovery, to give notice of the agent's act and is not prevented from recovering or holding the third person liable for the property wrongfully transferred.⁴

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Footnotes

- 1 Union Stock-Yards Nat. Bank v. Gillespie, 137 U.S. 411, 11 S. Ct. 118, 34 L. Ed. 724 (1890); Fay v. Slaughter,
194 Ill. 157, 62 N.E. 592 (1901); Baldwin v. Adkerson, 156 Va. 447, 158 S.E. 864, 103 A.L.R. 644 (1931).
2 Central Stock & Grain Exchange of Chicago v. Bendinger, 109 F. 926 (C.C.A. 7th Cir. 1901); Blacher v.
National Bank of Baltimore, 151 Md. 514, 135 A. 383, 49 A.L.R. 1366 (1926); Perry v. Oerman & Blaebaum,
63 W. Va. 566, 60 S.E. 604 (1908).
3 Stevenson v. Kyle, 42 W. Va. 229, 24 S.E. 886 (1896).
4 Dixie Guano Co. v. Wessel, 296 F. 433, 35 A.L.R. 322 (C.C.A. 4th Cir. 1924).

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XI. Rights, Duties, and Liabilities Between Principal and Third Person

B. Duties and Liability of Third Person to Principal

2. Tort Liability

§ 272. Property or funds wrongfully disposed of by agent— Money or property received in payment of agent's personal debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  101(3), 152(4), 159(1)

A person who knowingly receives money or other property of a principal from an agent in payment of the latter's debt does so at his or her peril; if the agent acts without authority, the principal, on proof of these facts, is entitled to recover.¹ Nor is it necessary for a principal, in order to recover money wrongfully paid by the agent in satisfaction of the latter's debt, to trace the identical money.²

However, in order to make one liable by reason of participation in misuse of money for the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show not only that the party sought to be charged was aware that the money belonged to the principal but also that he or she was aware that the debt paid by it was in fact a private debt of the agent or such a debt that payment thereof could not lawfully be made out of such money.³ If a trustee or agent converts the subject of the trust or agency into money and pays it in due course of business, in discharge of his or her own indebtedness, to one ignorant of the nature of his or her title, the payee acquires a perfect and indefeasible title as against the real owner, and the right of the principal to follow the money is gone.⁴ Further, where the transferee of the agent, although knowing that the money belongs to the principal, believes that the debt is also the principal's debt and is payable out of the trust funds, he or she becomes a bona fide holder, and the principal cannot recover.⁵

If an agent with authority to draw checks against the principal's funds fraudulently and without authority draws one to an innocent payee for the purpose of paying the agent's own debt, the payee is chargeable with the knowledge that the funds are being misappropriated by the agent so as to make the payee liable to the principal for the proceeds of the check.⁶ But even

so, where the principal waits an unreasonably long time before questioning the check, it may be held that there was either a ratification of the payment by the agent or an estoppel operating to deprive the principal of his or her rights.⁷

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Footnotes

- 1 Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U.S. 54, 26 L. Ed. 693, 1881 WL 19751 (1881); McRitchie v. Atlanta Trust Co., 170 Ga. 296, 152 S.E. 834 (1930); Gillen v. Wakefield State Bank, 246 Mich. 158, 224 N.W. 761 (1929).
- 2 Porter v. Roseman, 165 Ind. 255, 74 N.E. 1105 (1905).
- 3 Friend & Terry Lumber Co. v. Devine, 50 Cal. App. 102, 194 P. 754 (3d Dist. 1920); Perry v. Oerman & Blaebaum, 63 W. Va. 566, 60 S.E. 604 (1908).
- 4 Pearce v. Charles J. Upton & Co., 210 Ark. 524, 196 S.W.2d 761 (1946).
- 5 Steinberg v. Merchants' Bank of Kansas City, 334 Mo. 297, 67 S.W.2d 63 (1933); Perry v. Oerman & Blaebaum, 63 W. Va. 566, 60 S.E. 604 (1908).
- 6 Rochester & C. Turnpike Road Co. v. Paviour, 164 N.Y. 281, 58 N.E. 114 (1900).
- 7 Gordon v. Pettingill, 105 Colo. 214, 96 P.2d 416 (1939).

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 273. Generally; authorized acts or contracts

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 92(1), 159(.5) to 160

Forms

Forms relating to rights, duties, and liabilities between agent to third-person, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

It is not an agent's contract with the principal which exposes the agent to, or protects him or her from, liability to third persons but his or her common-law obligation to so use that which he or she controls as not to injure another; that obligation is neither increased nor diminished by the agent's entrance upon the duties of agency, nor can its breach be excused by the plea that his or her principal is chargeable.¹ Even so, an agent is not liable for lawful acts done within the scope of his or her authority for and on behalf of a disclosed principal,² nor is he or she liable to third parties for nonfeasance but only for affirmative acts of negligence or other wrongs.³

Observation:

Knowledge of the real principal is the test for determining whether the principal is considered to be "disclosed," and this means actual knowledge, not suspicion.⁴

Moreover, an agent cannot be held liable for inducing its principal to breach a contract with a third person, at least where it is acting on behalf of its principal and within the scope of its authority.⁵

As codified in some jurisdictions, agents may be responsible for their own independent torts and breaches of contract in connection with acts in the course of their agency.⁶ Generally, however, if a contract is made with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal alone, and the agent is not a party to the contract and cannot be held liable thereon unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly the agent's intention to assume the obligation as a personal liability and that the agent has been informed that credit has been extended to him or her alone.⁷ However, the mere fact a contracting party knew the identity of the other party's principal does not necessarily establish, as a matter of law, that the agent was not a party to the contract; rather, it merely permits an inference to that effect, which may be overcome by proving other facts connected with the transaction, including custom and usage.⁸

Under the Restatement Third of Agency, an agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party.⁹ Thus, conduct by an agent that breaches a duty owed by the agent to the principal does not subject the agent to liability to a third party who suffers pure economic loss as a result unless the agent's conduct also breaches a duty owed by the agent to the third party.¹⁰ An agent's misstatements may also subject the agent to liability to a third party, particularly where the third party justifiably relies on the statement.¹¹

An agent who holds a principal's property is not a trustee unless the agent acquires title to the property,¹² and an agent who receives money or other things from the principal to pay or transfer to another person is not thereby liable to the other.¹³

A personal representative acts as agent for the estate when contracting for anything necessary for the administration of the estate and is personally liable on a contract he or she signs only if he or she does not disclose the fact and intent of the agency.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Under New York Law, an agent who signs an agreement on behalf of a disclosed principal will not be held liable for its performance unless the agent clearly and explicitly intended to substitute his personal liability for that of his principal; in contrast, an individual who signs a contract as an agent for an entity will be held personally liable on the contract if the agency relationship is not disclosed. *Ads Plus Advertising, Inc. v. Ault*, 928 F. Supp. 2d 683 (W.D. N.Y. 2013).

An agent, by making a contract only on behalf of a disclosed principal, whom he has power to bind, does not thereby become liable for its non performance. *Clearwater REI, LLC v. Boling*, 318 P.3d 944 (Idaho 2014).

Energy companies that were disclosed principals of oil and gas leases signed only by their agent were bound by terms of leases, in breach of contract action brought by landowners, where parol evidence established that agent entered leases at the direction

and on behalf of energy companies. [Board of Education Toronto City Schools v. American Energy Utica, LLC](#), 2020-Ohio-586, 152 N.E.3d 378 (Ohio Ct. App. 7th Dist. Jefferson County 2020), appeal not allowed, 159 Ohio St. 3d 1407, 2020-Ohio-3174, 146 N.E.3d 586 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 Schur v. L.A. Weight Loss Centers, Inc., 577 F.3d 752, 74 Fed. R. Serv. 3d 429 (7th Cir. 2009) (applying Illinois law).
- 2 Lee v. YES of Russellville, Inc., 784 So. 2d 1022 (Ala. 2000); Hill v. County Concrete Co., Inc., 108 Md. App. 527, 672 A.2d 667 (1996); UST Corp. v. General Road Trucking Corp., 783 A.2d 931 (R.I. 2001). As to the principal's liability to a third person for authorized acts or transactions of an agent, see § 243.
- 3 Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dep't 2006) (overruled on other grounds by, Fletcher v. Dakota, Inc., 99 A.D.3d 43, 948 N.Y.S.2d 263 (1st Dep't 2012)).
- 4 Safety Environmental, Inc. v. Barberry Rose Management Co., Inc., 94 A.D.3d 969, 942 N.Y.S.2d 200 (2d Dep't 2012).
- 5 Devash LLC v. German American Capital Corp., 104 A.D.3d 71, 959 N.Y.S.2d 10 (1st Dep't 2013).
- 6 Kurtin v. Elieff, 215 Cal. App. 4th 455, 155 Cal. Rptr. 3d 573 (4th Dist. 2013), as modified on denial of reh'g, (May 8, 2013).
- 7 Whitney v. Wyman, 101 U.S. 392, 25 L. Ed. 1050, 1879 WL 16727 (1879); Willis v. Parker, 814 So. 2d 857 (Ala. 2001); County Forest Products, Inc. v. Green Mountain Agency, Inc., 2000 ME 161, 758 A.2d 59 (Me. 2000). As to the liability of an agent who assumes personal responsibility for a contract, see § 279.
- 8 As to the contractual liability of an agent of a partially disclosed or undisclosed principal, see §§ 295 to 297. Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc., 205 Cal. App. 3d 442, 252 Cal. Rptr. 573 (2d Dist. 1988).
- 9 Restatement Third, Agency § 7.02.
- 10 Restatement Third, Agency § 7.02, comment d.
- 11 Restatement Third, Agency § 7.02, comment d.
- 12 Restatement Third, Agency § 1.04, comment j.
- 13 L. C. S. Colliery, Inc. v. Mack, 447 Pa. 276, 290 A.2d 260 (1972).
- 14 Ward v. Property Tax Valuation, Inc., 847 S.W.2d 298 (Tex. App. Dallas 1992), writ denied, (June 23, 1993).

3 Am. Jur. 2d Agency § 274

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 274. Unauthorized contracts

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West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 155(.5), 155(2), 155(4)

Forms

Forms relating to purportedly authorized or unauthorized agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

One who purports as agent to enter into a contract, upon which the principal is not bound because the agent has contracted without authority or in excess of his or her authority, is personally liable for the damage thus occasioned to the other contracting party.¹ The damages recoverable will include any loss which the third party has suffered through not having a valid contract,² including any loss of benefit expected from the performance of the contract.³

Caution:

To give a party a right of action against a professed agent, he or she must have been ignorant of the lack of authority and have acted upon the faith of the express or implied representations that the professed agent had the authority assumed.⁴ Similarly, the agent

is not subject to liability to the third party if the agent sufficiently manifests that he or she does not warrant his or her authority and makes no tortious misrepresentation.⁵

Under the Restatement Third of Agency, a person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal.⁶ He or she will not be subject to liability to the third party, however, in any of the following situations:

- (1) the principal or purported principal ratifies the act;⁷
- (2) the person who purports to make the contract, representation, or conveyance gives notice to the third party that no warranty of authority is given;⁸
- (3) the third party knows that the person who purports to make the contract, representation, or conveyance acts without actual authority.⁹

Observation:

A representation by an agent made incident to a contract or conveyance is attributed to an undisclosed principal as if the principal made the representation directly when the agent acted without actual authority in making the representation but had actual authority to make true representations about the same matter.¹⁰

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Footnotes

- 1 First Nat. Bank of Chicago v. Jefferson Mortg. Co., 576 F.2d 479, 23 U.C.C. Rep. Serv. 1282 (3d Cir. 1978); In re Dreier LLP, 462 B.R. 474 (Bankr. S.D. N.Y. 2011) (applying New York law); Wolfson v. Beris, 295 N.W.2d 562 (Minn. 1980).
An agent who purports to act for his or her principal but is without any legal authority to do so may be liable to the other contracting party for breach of contract, breach of warranty of authority, or some other cause of action against the agent him- or herself. *Northlake Development L.L.C. v. BankPlus*, 60 So. 3d 792 (Miss. 2011).
- 2 Mendelsohn v. Holton, 253 Mass. 362, 149 N.E. 38, 42 A.L.R. 1307 (1925).
- 3 In re Dreier LLP, 462 B.R. 474 (Bankr. S.D. N.Y. 2011) (applying New York law).
- 4 Balzebre v. Pearson, 273 So. 2d 427 (Fla. 3d DCA 1973); Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106 (1952); Ershig Sheet Metal, Inc. v. General Ins. Co. of America, 62 Wash. 2d 402, 383 P.2d 291 (1963).

- 5 Duncan v. Peninger, 624 F.2d 486 (4th Cir. 1980); Yoakum v. Tarver, 256 Cal. App. 2d 202, 64 Cal. Rptr. 7
6 (2d Dist. 1967); Croteau v. Ash, 102 N.H. 453, 159 A.2d 582 (1960).
7 Restatement Third, Agency § 6.10.
8 Restatement Third, Agency § 6.10(1).
9 Restatement Third, Agency § 6.10(2).
10 Restatement Third, Agency § 6.10(3).
 Restatement Third, Agency § 6.11(3)(b).

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3 Am. Jur. 2d Agency § 275

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 275. Unauthorized contracts—Nature and theories of liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 155(.5), 155(2), 155(4)

An agent's liability to a third person on a contract rests upon the theory or ground that the agent warrants his or her authority and not that the contract is deemed to be the agent's.¹ Although there is authority to the contrary,² generally, apart from any statute to the contrary, an agent cannot be sued on a contract itself as a contracting party unless there are apt words therein to charge the agent personally.³

An agent may be held liable in tort for fraud and deceit where the agent knew at the time he or she assumed to act that he or she did not have the authority exercised.⁴

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Footnotes

¹ First Nat. Bank of Chicago v. Jefferson Mortg. Co., 576 F.2d 479, 23 U.C.C. Rep. Serv. 1282 (3d Cir. 1978); Wolfson v. Beris, 295 N.W.2d 562 (Minn. 1980); Brawley v. Anderson, 80 Ohio App. 15, 35 Ohio Op. 410, 48 Ohio L. Abs. 250, 74 N.E.2d 428 (1st Dist. Hamilton County 1947).

² Brawley v. Anderson, 80 Ohio App. 15, 35 Ohio Op. 410, 48 Ohio L. Abs. 250, 74 N.E.2d 428 (1st Dist. Hamilton County 1947); Skinner & Ruddock, Inc. v. London Guarantee & Acc. Co., 239 S.C. 614, 124 S.E.2d 178 (1962).

³ Weinstein v. Rothberg, 87 Ga. App. 94, 73 S.E.2d 106 (1952); Fieschko v. Herlich, 32 Ill. App. 2d 280, 177 N.E.2d 376 (2d Dist. 1961); Brawley v. Anderson, 80 Ohio App. 15, 35 Ohio Op. 410, 48 Ohio L. Abs. 250, 74 N.E.2d 428 (1st Dist. Hamilton County 1947).

As to the liability of an agent who assumes personal responsibility for a contract, see § 279.

- 4 Ferroni v. Pacific Finance Corp. of Cal., 21 Cal. 2d 773, 135 P.2d 569 (1943); People v. Monroe, 85 Mich. App. 110, 270 N.W.2d 655 (1978); Glendale Realty, Inc. v. Johnson, 6 Wash. App. 752, 495 P.2d 1375 (Div. 1 1972).

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 276. Agent for foreign principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 135, 136(6)

The mere fact in and of itself that an agent is representing a principal whose residence or domicile is a foreign country does not make the agent personally liable on a contract executed by the agent for such principal. Rather, the agent of a foreign national is not personally liable, as a matter of law, on every contract made for the principal; it is a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances.¹

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Footnotes

¹ [Oelricks v. Ford](#), 64 U.S. 49, 23 How. 49, 16 L. Ed. 534, 1859 WL 10647 (1859); [Maury v. Ranger](#), 38 La. Ann. 485, 1886 WL 4207 (1886).

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 277. Where principal is fictitious, nonexistent, or without legal status

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 136(6), 155(.5), 155(2), 155(4)

When an individual purporting to act on behalf of a nonexistent principal enters into a contract with a third party, the contract does not for that reason alone become void or voidable at the whim of the third party.¹ Rather, one who contracts as an agent in the name of a nonexistent or fictitious principal, or a principal without legal status or existence, is personally liable on the contract so made.² Furthermore, a purported agent is not excused from personal liability on contracts he or she executed on behalf of a nonexistent principal even though the agent acted in entire good faith, honestly believing that he or she was contracting for an existing principal.³ Unless it is otherwise agreed,⁴ the agent is liable even though the third party also knew the principal was nonexistent.⁵ If the third party knows that there is no principal capable of entering into a contract, there is a rebuttable inference that although the contract is nominally in the name of the nonexistent person, the parties intend that the person signing as agent should be a party unless there is some indication to the contrary.⁶ Furthermore, a contract entered into prior to an entity's formation is not void ab initio due to lack of capacity because the individual entering into the contract on behalf of the unformed entity has the requisite capacity; in the situation of an unformed entity, the individual serves as the party to the contract although the contract is entered into in the entity's name.⁷

On the other hand, because the general rule is founded upon the presumption that the parties intended to create an enforceable obligation, it does not obtain when it appears, either by express agreement or from the circumstances, that the agent is not to be personally liable.⁸

According to the Restatement Third of Agency, unless the third party agrees otherwise, a person who makes a contract with a third party purportedly as an agent on behalf of a principal becomes a party to the contract if the purported agent knows or has reason to know that the purported principal does not exist.⁹

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Footnotes

- 1 Metro Kitchenworks Sales, LLC v. Continental Cabinets, LLC, 31 A.D.3d 722, 820 N.Y.S.2d 79 (2d Dep't 2006).
- 2 Ruso v. Morrison, 695 F. Supp. 2d 33 (S.D. N.Y. 2010) (applying New York law); BCI Const., Inc. v. Whelan, 67 A.D.3d 1102, 888 N.Y.S.2d 272 (3d Dep't 2009); Plain Dealer Publishing Co. v. Worrell, 178 Ohio App. 3d 485, 2008-Ohio-4846, 898 N.E.2d 1009 (9th Dist. Summit County 2008).
- 3 Fowle v. Kerchner, 87 N.C. 49, 1882 WL 2886 (1882); Lagrone v. Timmerman, 46 S.C. 372, 24 S.E. 290 (1896).
- 4 Metro Kitchenworks Sales, LLC v. Continental Cabinets, LLC, 31 A.D.3d 722, 820 N.Y.S.2d 79 (2d Dep't 2006).
- 5 Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp., 526 F.2d 724 (3d Cir. 1975); Vodopich v. Collier County Developers, Inc., 319 So. 2d 43 (Fla. 2d DCA 1975).
- 6 RKO-Stanley Warner Theatres, Inc. v. Graziano, 467 Pa. 220, 355 A.2d 830 (1976).
- 7 BRJM, LLC v. Output Systems, Inc., 100 Conn. App. 143, 917 A.2d 605 (2007).
- 8 Bryce v. Bull, 106 Fla. 336, 143 So. 409 (1932); Hagan v. Asa G. Candler, Inc., 189 Ga. 250, 5 S.E.2d 739, 126 A.L.R. 108 (1939); Decker v. Juzwik, 255 Iowa 358, 121 N.W.2d 652 (1963).
- 9 Restatement Third, Agency § 6.04.

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 278. Where principal is incompetent or under legal disability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 101(1), 136(1), 155(.5), 155(2), 155(4)

According to some courts, an agent is held liable when the purported principal disclosed is legally incompetent.¹ According to other courts, however, an agent of one who lacks the capacity to contract is not necessarily liable on the contract because an agent does not impliedly warrant that the principal has full contractual capacity any more than he or she impliedly warrants that the principal is solvent.² In fact, when dealing with an agent, the purchaser of real property has a duty to establish whether the principal has the capacity to place authority in an agent.³ If the agent misrepresents the capacity of the principal to contract, the agent is liable as for any other misrepresentation, whether the misrepresentation is tortious or innocent; however, in the absence of misrepresentation, it must appear, in order to hold the agent personally liable, that the agent knew or had reason to know of the principal's lack of full capacity, and it must further appear that the other contracting party was in ignorance thereof.⁴

According to the Restatement Third of Agency, unless the third party agrees otherwise, a person who makes a contract with a third party purportedly as an agent on behalf of a principal becomes a party to the contract if the purported agent knows or has reason to know that the purported principal lacks the capacity to be a party to a contract.⁵

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Footnotes

- 1 [Odyssey Travel Center, Inc. v. RO Cruises, Inc.](#), 262 F. Supp. 2d 618 (D. Md. 2003) (applying Maryland law).
- 2 [Goldfinger v. Doherty](#), 153 Misc. 826, 276 N.Y.S. 289 (App. Term 1934), aff'd, 244 A.D. 779, 280 N.Y.S. 778 (1st Dep't 1935).
- 3 [Stone v. Jetmar Properties, LLC](#), 733 N.W.2d 480, 43 A.L.R.6th 813 (Minn. Ct. App. 2007).

- 4 Prince George's Country Club, Inc. v. Edward R. Carr, Inc., 235 Md. 591, 202 A.2d 354 (1964); Goldfinger
v. Doherty, 153 Misc. 826, 276 N.Y.S. 289 (App. Term 1934), aff'd, 244 A.D. 779, 280 N.Y.S. 778 (1st Dep't
1935); Express Pub. Co. v. Levenson, 292 S.W.2d 357 (Tex. Civ. App. San Antonio 1956), writ dismissed
(holding also that the transaction must be one in which lack of full capacity is a material fact).
- 5 Restatement Third, Agency § 6.04.

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 279. Agent assuming personal responsibility

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 136(1)

Forms

Forms relating to individual liability, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

An agent may pledge his or her individual responsibility and become bound by engaging expressly to perform the principal's obligation,¹ and under such circumstances, the agent will be personally liable even though he or she was known to be an agent and did not intend to become bound.²

CUMULATIVE SUPPLEMENT

Cases:

Under District of Columbia law, where a principal is disclosed, no liability will fall upon the agent for acts committed by the principal unless he binds himself for same by definite words or stipulation. [Robinson v. Deutsche Bank Nat. Trust Co.](#), 932 F. Supp. 2d 95 (D.D.C. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 Penton v. Healy, 863 So. 2d 684 (La. Ct. App. 4th Cir. 2003); Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wash. 2d 679, 430 P.2d 600 (1967); Lutz v. Williams, 79 W. Va. 609, 91 S.E. 460 (1917).
- 2 Shoenthal v. Bernstein, 276 A.D. 200, 93 N.Y.S.2d 187 (1st Dep't 1949); Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 320 Pa. Super. 291, 467 A.2d 330 (1983).

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

1. In General

§ 280. Tort liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 159(.5), 159(2), 160

Trial Strategy

[Liability of Creditor and Repossession Agent for Wrongful Repossession and Tortious Acts Committed During Repossession](#),
42 Am. Jur. Proof of Facts 3d 355

Generally, agency law does not insulate an agent from liability for his or her torts¹ because an agent's tort liability is not based upon the contractual relationship between the principal and agent but upon the common-law obligation that every person must so act or use that which he or she controls as not to injure another.² Thus, whether acting on his or her own behalf or for another, an agent who violates a duty owed to a third person is answerable to the injured party for the consequences.³ An agent is not relieved from liability merely because he or she acted at the request, command, or direction of the principal.⁴

Observation:

The law does not require an agent to commit a tortious act at the direction of the principal in order for punitive damages to be imposed on him or her.⁵

An agent may be held liable to a third person for his or her own negligence⁶ or his or her own positive wrongs, such as a trespass,⁷ an assault,⁸ the conversion of property,⁹ fraud or misrepresentation,¹⁰ or other tortious conduct.¹¹

However, where a defendant acts as an agent for a known principal, the defendant-agent incurs no liability for a principal's breach of duty.¹²

The rule under the Restatement Third of Agency is that an agent is subject to liability to a third party harmed by the agent's tortious conduct even though the actor acts as an employee or within the scope of employment.¹³ Most privileges held by a principal, however, may be delegated to an agent, but to be protected by a privilege held by the principal, an agent must act for the purpose for which the privilege is given to the principal.¹⁴ The functions that an agent performs may cloak with a privilege conduct by the agent that would otherwise be tortious because proper performance of the agent's functions requires that the agent have some freedom to take action without undue inhibition.¹⁵

In situations where the principal owes no duty or less than the normal duty of care to the person harmed, the agent likewise has either no duty or a diminished duty to that third party even for actions that otherwise would constitute a tort.¹⁶

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Footnotes

- 1 Blouin v. Sanborn, 155 N.H. 704, 929 A.2d 194 (2007); Appleton Chinese Food Service, Inc. v. Murken Ins., Inc., 185 Wis. 2d 791, 519 N.W.2d 674 (Ct. App. 1994).
- 2 Hopkins v. Clemson Agr. College of South Carolina, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890 (1911); Schur v. L.A. Weight Loss Centers, Inc., 577 F.3d 752, 74 Fed. R. Serv. 3d 429 (7th Cir. 2009) (applying Ill. law); Fortech, L.L.C. v. R.W. Dunteman Co., Inc., 366 Ill. App. 3d 804, 304 Ill. Dec. 201, 852 N.E.2d 451 (1st Dist. 2006); Blouin v. Sanborn, 155 N.H. 704, 929 A.2d 194 (2007).
- 3 Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000) (applying Mississippi law); Lombardo v. Albu, 199 Ariz. 97, 14 P.3d 288 (2000); Fortech, L.L.C. v. R.W. Dunteman Co., Inc., 366 Ill. App. 3d 804, 304 Ill. Dec. 201, 852 N.E.2d 451 (1st Dist. 2006).
- 4 Orell v. UMass Memorial Medical Center, Inc., 203 F. Supp. 2d 52 (D. Mass. 2002); Boynton v. Buchanan, 12 Mass. App. Ct. 822, 429 N.E.2d 365 (1981); Kingston v. Helm, 82 S.W.3d 755 (Tex. App. Corpus Christi 2002).
- 5 Burke v. TransAm Trucking, Inc., 605 F. Supp. 2d 647 (M.D. Pa. 2009).
- 6 Am. Jur. 2d, Employment Relationship § 409.
- 7 Am. Jur. 2d, Trespass § 60 (joint tortfeasor with principal).
- 8 Am. Jur. 2d, Assault and Battery § 103.
- 9 Am. Jur. 2d, Conversion §§ 61, 62.
- 10 Am. Jur. 2d, Fraud and Deceit § 306.
- 11 National Car-Brake Shoe Co. v. Terre Haute Car & Mfg. Co., 19 F. 514 (C.C.D. Ind. 1884) (infringement of a patent); Stevenson v. Valentine, 27 Neb. 338, 43 N.W. 107 (1889) (meddling, without authority, with a decedent's estate); State v. Malone Service Co., 853 S.W.2d 82 (Tex. App. Houston 14th Dist. 1993), writ denied, (Sept. 10, 1993) (environmental torts).
As to the tort liability of an agent contracting without, or in excess of, authority, see § 274.

As to the tort liability of an agent assuming to act for a fictitious or nonexistent principal, see § 277.

12 Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000) (applying Mississippi law).

13 Restatement Third, Agency § 7.01.

14 Restatement Third, Agency § 7.01, comment e.

15 Restatement Third, Agency § 7.01, comment e.

16 Luchejko v. City of Hoboken, 207 N.J. 191, 23 A.3d 912 (2011).

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3 Am. Jur. 2d Agency § 281

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

A. Duties and Liability of Agent to Third Person

2. Liability for Return of Money

§ 281. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 154(1), 154(2)

An agent to whom money has been paid for the principal through error, or under other circumstances existing at the time of payment that would entitle the payer to recover it back from the principal, is individually liable to the payer for the money so received so long as it remains in the agent's hands, and there has been no alteration in the situation of the agent toward the principal in relation to such payment.¹ However, the rules requiring an agent to pay back money of a third person received for the principal do not apply where the agent is obviously a mere carrier or instrument for the transfer of the fund from the third person to the principal; in such an instance, where the agent is a mere conduit, the agent's holding does not create a possession in the agent, who is merely a custodian without authority to return the funds.²

Caution:

If the agent has notice that the other party has rescinded or if the agent learns facts from which he or she should realize that the other is entitled to and will demand rescission, as where the agent or principal is fraudulent in inducing the transaction, a subsequent change of position does not relieve the agent from the duty of returning what was received.³

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Footnotes

- 1 Eggerling v. Cuhel, 196 Neb. 745, 246 N.W.2d 199 (1976); Hicks v. Howell, 203 Va. 32, 121 S.E.2d 757 (1961); Mader v. James, 546 P.2d 190 (Wyo. 1976).
As to an agent's liability where the agent has paid the money to the principal in good faith without notice of the third person's claim, see § 282.
- 2 Cary v. Curtis, 44 U.S. 236, 3 How. 236, 11 L. Ed. 576, 1845 WL 6033 (1845).
- 3 Gordon v. Burr, 506 F.2d 1080 (2d Cir. 1974).
As to the effect of an agent's fraud on the duty to return the payment to the third person after having made payment over to the principal, see § 282.

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A. Duties and Liability of Agent to Third Person

2. Liability for Return of Money

§ 282. Effect of payment over to principal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 154(1), 154(2)

A recovery back of money paid to a disclosed and innocent agent ordinarily is not permitted where the agent has paid over the money to the principal in good faith without notice of the claim for its return.¹ The rule is the same where the agent in good faith has settled with the principal before the attempted reclamation of the money.² However, for settlement with or payment to the principal to relieve the agent from liability, the settlement or payment must be an actual one and not the constructive one arising from a change in their relationship from agent and principal to debtor and creditor.³ Merely placing the payment to the credit of the principal will not exonerate the agent from liability to the payer in the event of his or her recalling the payment.⁴

If the agent knows that the principal is not entitled to funds received for the principal from a third person, the agent is under a duty to return them to the one rightfully entitled thereto; if the agent turns over such funds to the principal with knowledge that the latter is not entitled thereto, the agent becomes personally liable therefor.⁵ Also, a known agent who, by fraud, mistake, or wrongful act, induces an innocent person to pay over money to him or her for the principal is liable for money so paid even if the agent pays the money to the principal.⁶ Likewise, an agent who illegally receives money knowing that neither he or she nor the principal is entitled is not relieved of liability by paying the money over to the principal.⁷

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Footnotes

¹ [Hooper v. Robinson](#), 98 U.S. 528, 25 L. Ed. 219, 1878 WL 18419 (1878); [State, Dept. of Revenue, Child Support Enforcement Div. ex rel. P. M. v. Mitchell](#), 930 P.2d 1284 (Alaska 1997); [Kost v. Peterson](#), 292 Minn. 46, 193 N.W.2d 291 (1971).

- 2 Carson v. Federal Reserve Bank of New York, 254 N.Y. 218, 172 N.E. 475, 70 A.L.R. 435 (1930); U.S. Nat.
Bank of Portland v. Stonebrink, 200 Or. 176, 265 P.2d 238 (1954).
- 3 Globe Indem. Co. v. Thayer County Bank, 135 Neb. 484, 282 N.W. 400 (1938); Carson v. Federal Reserve
Bank of New York, 254 N.Y. 218, 172 N.E. 475, 70 A.L.R. 435 (1930).
- 4 Metropolitan Nat. Bank v. Merchant's Nat. Bank, 182 Ill. 367, 55 N.E. 360 (1899); Mader v. James, 546
P.2d 190 (Wyo. 1976).
- 5 Cary v. Curtis, 44 U.S. 236, 3 How. 236, 11 L. Ed. 576, 1845 WL 6033 (1845); Globe Indem. Co. v. Thayer
County Bank, 135 Neb. 484, 282 N.W. 400 (1938); City of Sheboygan v. Finnegan, 245 Wis. 349, 13 N.W.2d
923 (1944).
- 6 Millsap v. National Funding Corp. of Cal., 57 Cal. App. 2d 772, 135 P.2d 407 (1st Dist. 1943); Hardy v.
American Exp. Co., 182 Mass. 328, 65 N.E. 375 (1902); Sobolik v. Vavrowsky, 146 N.W.2d 761 (N.D. 1966).
- 7 Bend v. Hoyt, 38 U.S. 263, 10 L. Ed. 154, 1839 WL 4333 (1839); Messer-Moore Ins. & Real Estate Co. v.
Trotwood Park Land Co., 170 Ala. 473, 54 So. 228 (1910); Gerdes v. Reynolds, 28 N.Y.S.2d 622 (Sup 1941).

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A. Duties and Liability of Agent to Third Person

2. Liability for Return of Money

§ 283. Where right to return arises after payment to agent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 154(1), 154(2)

Forms

Forms relating to agent of vendor, generally, see Am. Jur. Pleading and Practice Forms, Vendor and Purchaser [[Westlaw® Search Query](#)]

A suit to recover money paid to an agent upon the ground that the principal subsequently breached the contract must be brought against the principal and not against the agent because the alleged breach of contract does not retroactively affect the lawfulness of the payment and its receipt by the agent at the time when it was made.¹ Similarly, where money had been paid upon a judgment subsequently reversed or as deposit money to bind a contract of sale which the vendor failed to fulfill, the agent is not liable to the payor.² Moreover, recovery may be refused notwithstanding that the agent still has possession of the money;³ however, some courts have held the agent liable for money paid to him or her for the principal so long as the agent stands in his or her original position and until there has been some change of circumstances by the agent's having paid the money over to the principal.⁴

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Footnotes

¹ [Garrison v. Edward Brown & Sons](#), 25 Cal. 2d 473, 154 P.2d 377 (1944).

- 2 Wilson v. Wold, 21 Wash. 398, 58 P. 223 (1899).
3 Middleworth v. Blackwell, 85 A.D. 613, 82 N.Y.S. 704 (2d Dep't 1903).
4 Gauss v. Kirk, 198 F.2d 83, 33 A.L.R.2d 1085 (D.C. Cir. 1952); Pancoast v. Dinsmore, 105 Me. 471, 75
A. 43 (1909).

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3 Am. Jur. 2d Agency § 284

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2. Liability for Return of Money

§ 284. Money paid subject to return upon certain contingency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#) 154(1), 154(2)

Generally, money paid an agent for the benefit of a known principal, to be returned to the payor upon nonperformance of certain conditions, cannot, when the payor becomes entitled to its return, be recovered from the agent because the question whether the payor is entitled to the money is one that does not concern the agent but is between the payor and the principal.¹ If, however, the agent agrees personally to refund money paid upon certain conditions, upon the happening thereof, the agent will be liable to the payor notwithstanding that he or she has paid the money to the principal.² Likewise, an agent who is a mere stakeholder of money to be returned in certain events to the payor is liable for the money notwithstanding the agent's payment of the money to the principal.³

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Footnotes

- 1 [Kost v. Peterson](#), 292 Minn. 46, 193 N.W.2d 291 (1971); [Levine v. Field](#), 114 N.Y.S. 819 (App. Term 1909); [Sobolik v. Vavrowsky](#), 146 N.W.2d 761 (N.D. 1966).
- 2 [White v. Taylor](#), 113 Mich. 543, 71 N.W. 871 (1897).
- 3 [Martin v. Allen](#), 125 Mo. App. 636, 103 S.W. 138 (1907); [Read v. Riddle](#), 48 N.J.L. 359, 7 A. 487 (N.J. Ct. Err. & App. 1886).

3 Am. Jur. 2d Agency XII B Refs.

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B. Duties and Liability of Third Person to Agent

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Research References

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  162, 183(1)

A.L.R. Library

A.L.R. Index, Agency

A.L.R. Index, Personal Liability

West's A.L.R. Digest, [Principal and Agent](#)  162, 183(1)

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3 Am. Jur. 2d Agency § 285

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

B. Duties and Liability of Third Person to Agent

§ 285. Generally; contractual liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Principal and Agent](#)  162, 183(1)

Where an agent, acting for a disclosed principal, contracts with third persons for and on account of the principal and in the principal's name, the contract is that of the principal and enforceable by the principal against the third persons.¹ Such a contract generally does not give rise to any contractual obligation running to the agent,² and as such, the agent does not ordinarily have a cause of action based upon the third person's violation of his or her principal's rights.³ Consequently, an agent generally does not have standing to sue a defendant in his or her own name unless he or she is an assignee,⁴ has express authority from the principal, or is authorized by a statute to do so.⁵ If, however, an agent, even though he or she discloses the principal, in contracting for the principal, executes the contract in his or her own name or in such manner as to make it the agent's personal contract, the third person becomes liable to the agent on the contract.⁶ The agent may, in such case, sue in his or her own name to enforce the contract or rights arising thereunder.⁷

A third person to whom an agent has by mistake paid money belonging to the principal is liable to the agent for the money so paid.⁸

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Footnotes

¹ [§ 268.](#)

² [Gearing v. Berkson](#), 223 Mass. 257, 111 N.E. 785 (1916).

³ [Epic Communications, Inc. v. Richwave Technology, Inc.](#), 179 Cal. App. 4th 314, 101 Cal. Rptr. 3d 572 (6th Dist. 2009).

- 4 McCulloch v. Hartford Life and Acc. Ins. Co., 363 F. Supp. 2d 169 (D. Conn. 2005) (applying Connecticut
law).
- 5 Braddock, L.C. v. Board of Sup'rs of Loudoun County, 268 Va. 420, 601 S.E.2d 552 (2004).
- 6 Albany & Rensselaer Iron & Steel Co. v. Lundberg, 121 U.S. 451, 7 S. Ct. 958, 30 L. Ed. 982 (1887);
Costanzo Coal Min. Co. v. Weirton Steel Co., 150 F.2d 929 (C.C.A. 4th Cir. 1945); Shelby v. Burrow, 76
Ark. 558, 89 S.W. 464 (1905).
- 7 § 313.
- 8 Parks v. Fogleman, 97 Minn. 157, 105 N.W. 560 (1906).

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3 Am. Jur. 2d Agency § 286

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XII. Rights, Duties, and Liabilities Between Agent and Third Person

B. Duties and Liability of Third Person to Agent

§ 286. Tort liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Principal and Agent  162, 183(1)

Forms

Forms relating to rights duties and responsibilities of third-persons to agent, generally, see Am. Jur. Pleading and Practice Forms, Agency [[Westlaw® Search Query](#)]

Third persons who by their tortious acts cause injury to an agent are liable to the agent for such injuries.¹

Observation:

For an agent to have standing to sue, it is not enough for the agent to allege an injury that is qualitatively different from that suffered by the principal; rather, the agent must allege an injury that does not derive from the injury to the principal.²

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Footnotes

- 1 [Donohue v. McDonald](#), 92 Ky. 123, 13 Ky. L. Rptr. 413, 17 S.W. 195 (1891); [Loughery v. Huxford](#), 206 Mass. 324, 92 N.E. 328 (1910).
- 2 [Pagan v. Calderon](#), 448 F.3d 16 (1st Cir. 2006).

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